No. [illegible]

Office Supreme
FILE
MAR 14
JAMES H. Mc

IN THE

Supreme Court of the United States

LUTCHER & MOORE LUMBER CO.

PETITIONERS

Versus

WILLIAM H. KNIGHT ET AL.

RESPONDENTS

PETITIONER'S BRIEF

—BY—

GEO. E. HOLLAND,
A. P. PUJO
Attorneys for Petitioners.

The Leader Printing Co., Orange, Texas

DARK PAGE

IN THE

Supreme Court of the United States

LUTCHER & MOORE LUMBER CO.

PETITIONERS

Versus

WILLIAM H. KNIGHT ET AL.

RESPONDENTS

PETITIONER'S BRIEF

STATEMENT OF CASE.

Respondents here on March 11, 1903, filed this suit in the District Court of Vernon Parish, Louisiana, and upon proper bond and petition, it was moved by Petitioners to the Circuit Court of the United States for the Western District of Lousiana.

By their petition Respondents sought to recover from

BLEED THRU

Petitioners several tracts of land in Vernon Parish, Louisiana, of the proven value of over Five Thousand Dollars. Their claim was substantially that these lands were acquired by their father in his name during the marriage relationship between their father and mother and were the community assets of that co-partnership. That after the death of the mother, the father holding title in his name, conveyed to Petitioners, title to all of said lands. That because of the death of the mother, they, as her heirs, were entitled in indivision to a one-half interest in said properties for which they pray recovery. (Tr. 2).

The cause was docketed on the law docket of the Circuit Court and Petitioners here filed their bill in in equity in said Court containing all of their defenses filed in this suit and prayed that same be heard in equity and that the proceedings at law be stayed for that purpose. (Tr. 134). Upon demurrer to this complaint on the ground that the several defenses were triable at law and in this suit; (Tr. 141), the trial Court dismissed Plaintiffs bill in equity (Tr. 143) and heard all of the case together, rendering judgment in favor of Petitioners here. Respondents appealed from this judgment and the Circuit Court of Appeals of the Fifth Circuit reversed the cause because of some defect in the petition for removal.

In the trial Court after the reversal; the petition for removal was corrected and a trial **de novo** of the cause had, at which the trial Court refused Petitioners here the

BLURRED

right to introduce any evidence on their defenses set up and refused to submit such defenses to the jury and under instructions from the Court, a verdict was returned against Petitioners and in favor of Respondents for the land sued for and judgment of the Court rendered accordingly. (Tr. 72).

Petitioners defenses consisted of:

1st. A denial of the marriage between Plaintiff's father and mother.

2nd. A denial that the property sued for ever was a portion of the community of acquets and gains of Plaintiff's father and mother, and as a reason why same was not a part of such community property, Petitioners alleged (1) That the sale to the Plaintiff's father was a simulated transaction made by the grantors in the deed to him for the purpose of covering said property from their creditors, thus placing it beyond their reach, but giving the father of Plaintiffs no beneficial interest in same, and that he never held a beneficial interest in same. (2) That no consideration was paid by Plaintiff's father for said property, but that same was a gift to him by the grantors in the deed to him. (3) That the title held by Plaintiff's father was one in trust for the grantors in the deed to him, intended to give him the widest powers of agency over the property, but that he never held any beneficial interest in the property. (4) That the consideration recited in the deed to Plaintiff's father was never paid nor was any consideration ever

paid by him for the property. Petitioners further plead innocent purchase of the property for value in good faith and claimed their right to hold the same as such innocent purchasers, and plead the ten year statute of prescription. (Tr. 8-13).

Respondents case consisted of the deed to their father conveying the property in legal form reciting the consideration to be Five Hundred Dollars cash and Fourteen Thousand Five Hundred Dollars evidenced by note described in the deed, proof of the subsequent death of the mother prior to the sale of the land by the father and their heirship. The trial court refused to admit any evidence offered by Petitioners, except the value of the land, their purchase without notice, the payment of value and the continuous payment of taxes by them since their purchase. The cause was appealed by Petitioners to the Circuit Court of Appeals of the Fifth Circuit upon the following assignment of errors:

I. The Court erred in the rejection of evidence offered by the Defendants in the following instances, to-wit:

(a) In rejecting the evidence of Dr. J. A. Lovett, who in effect testified that the land in controversy formerly belong to a partnership known as "Knight & Lovett," of which the witness was a junior member, who in order to confer on W. J. Knight, father of the Plaintiff, the fullest powers of agency, purported to transfer to him the land in controversy for a stated consideration of Fifteen

Thousand Dollars, Five Hundred Dollars of which purported to have been paid in cash and the balance in one note of Fourteen Thousand Five Hundred Dollars, due at one month. But that the Five Hundred Dollars purporting to have been paid in cash was the money of Knight & Lovett, and the Fourteen Thousand Five Hundred Dollar note was never paid by W. J. Knight in any way until long after the death of his wife, and that then it was paid in carrying out this agreement made before and at the time of the sale to W. J. Knight on July 28, 1882, whereby W. J. Knight agreed to hold the property in question as trustee and agent of Knight & Lovett. That all of the sales made of the property in controversy by W. J. Knight, the father of the Plaintiff, after the death of his wife and their mother, the proceeds of such sales were delivered to Knight & Lovett, the former vendors, in pursuance of said agreement, as will fully appear by the testimony of said Dr. Lovett attached to and forming part of Defendants bill of exception No. 1.

II. In rejecting that portion of the evidence of Dr. J. A. Lovett, a witness for the Defendants, which was offered to show and which did show that the credit portion of the purchase price of W. J. Knight from Knight & Lovett, of date, July 28, 1882, was paid in and about 1889, out of the sales made by W. J. Knight of the land in controversy, and that the proceeds of such sale so made by W. J. Knight were used to pay the credit portion of such purchase price as will fully appear by the testimony of said J. A. Lovett, annexed and forming a part

ED PAGES

of Defendants bill of exception No. 1, and as fully set forth in Defendants bill of Exception No. 3.
W. Word M etaoin shrdlu etaoin shrdu cmlwfetaoinetao

(a) In excluding the testimony of the witnesses, T. J. Word and A. W. McCranie, offered on behalf of the Defendants to show that the credit portion of the purchase price of the sale from Knight & Lovett to W. J. Knight of date July 28, 1882, to the land in controversy was paid after the death of the wife of W. J. Knight, the mother of the Plaintiffs by the sale of the land in controversy, and the proceeds of the said sale of land in question was used to pay the credit portion of the purchase price mentioned in said sale, which was secured by a vendor's privilege on said land, and that the identical proceeds of the sale of said land in controversy was used only for that purpose, as all of which is fully set forth in Defendants' bill of exception No. 3.

III. The Court erred in refusing to permit the Defendants to file their third amended answer, which is attached to and made a part of Defendants' bill of exception No. 2.

IV. The Court erred in making the charge to the jury in refusing to state propositions requested by the Defendants in the following instances:

(a) In refusing to charge the jury as follows: There being evidence before the Court tending to support the charge thus requested and the same having not been covered by the Court's general charge:

BLURRE

"The Defendants in this case have filed a plea of ten years prescription, urging that they have held the property in question under a just title and in good faith for more than ten years before said suit was brought. I charge you that the title under which they hold may be denominated a just title, valid on its face, and if you find that they have held such a title for more than ten years, in good faith, believing that they were the owners of the property, then I charge you that the plea of prescription ought to be sustained, unless the evidence has shown some fact that would prevent the running of prescription against the Plaintiffs."

(b) The Court erred in refusing to charge the jury in behalf of the Defendants, as follows:

"In this case, the Plaintiffs claim as heirs of their mother, one-half interest in the property in question on the ground that it was bought during the lifetime of their mother, during the existence of the community of acquets and gains between her and their father, W. H. Knight, and was sold by the father after the death of their mother. I charge you that in order for them to recover that it is necessary for them to show that the community between their father and mother had been settled and liquidated by the payment of its debts, and until they do so, they cannot recover any interest in any specific piece of property." Which said special charge is fully set forth in Defendants bill of exception No. 5.

V. The court erred in overruling the motion of De-

fendants for a new trial, as set forther (forth) in Defendants bill of Exception No. 6.

VI. The Court erred in entering judgment in favor of the Plaintiffs and against the Defendants.

The Circuit Court of Appeals of the Fifth Circuit affirmed the cause in the following opinion:

"After a thorough and attentive consideration of the questions raised on this writ, we are of the opinion that the matters of defense relied upon by Plaintiffs in Error on the trial below, in so far as they were not given consideration, were of an equitable nature, not cognizable in a Court of law, we therefore affirm the judgment of the District Court." (Tr. 103).

Petitioners show to this Honorable Court that error has been committed in the following matters, to-wit:

I.

The Circuit Court of Appeals erred in holding the defenses of the Plaintiffs in Error not cognizable in a Court of law after a final decision to the contrary by a Federal Court in the same cause between same parties.

II.

The Circuit Court and Circuit Court of Appeals erred in holding the cause of action of Defendants in Error cognizable in a Court of law.

BLURRE

III.

The Circuit Court of Appeals erred in holding the defenses of the Plaintiffs in Error cognizable only in equity, whereas same were but denials of Plaintiffs action and the presumptions of fact arising thereon.

IV.

Error was comitted in not directing a verdict for Defendants under Plaintiffs proof.

V.

Error was committed in not allowing evidence that the lands sued for were held in trust and without a beneficial interest.

VI.

Error was committed in not holding Plaintiffs in Error entitled to protection in their title as innocent purchasers for value.

Taking the specification of errors consecutively, we desire to call the Court's attention to the attitude Petitioners have been placed in because of the Circuit Court of Appeals at its own initiative refusing to consider Petitioners defenses at law.

If the phrase **"Nihil in lege intolarabilius est, eandam rem diverso jure censeri"** has any meaning or force, or can have any application, it is presented by this cause. In a suit between the same parties the Circuit Court of

PAGES

the United States for the Western District of Louisiana held by final decree rendered, that the defenses urged by Petitioners in this cause were properly triable at law and in this cause. This holding was had and was the result of the contention of Respondents in this cause. The cause was tried in said Court in obedience to its decision thus announced. After this decision had reached the age limit from which no writ of error from it would lie, and on second appeal of this cause, without contention by either party, the Honorable Circuit Court of Appeals announces a different decision and thereby cuts off from Petitioners any remedy for the rights they are admitted by all parties and all Courts to have.

We contend that the determination of the Circuit Court that Petitioners' defenses were not in equity amounted to an adjudication that they had the right to urge the same in this action, in a court at law, and that as to such defenses; their right to here urge same is **stare decisis.** (Berry vs. Ginaca—5—Fed. Rep.—475). To say the least of it, the defenses urged are concurrent at law and in equity and Respondents having by their act obtained a judicial determination of the question, that they are properly triable at law, have waived any contention to the contrary.

Petitioners are in the attitude of having a cause with merit, but without a tribunal in which to urge it, the Federal Court having locked its door by final decree against their defenses presented in equity and a Federal

BLURR

Court having locked its door against their defenses presented at law; and yet both parties admitting that such defenses are just and a complete answer to Plaintiffs case.

Petitioners present here the contention that the cause of action set up by the Respondents is one in equity and not at law and over which jurisdiction ought not to have been entertained by either the Circuit Court or Circuit Court of Appeals.

Respondents action is nothing more nor less than a suit to remove cloud from their secret equitable title. The petition presents the fact that Petitioners are not the holders of the legal title, and their claim is through the mother because of her secret one-half interest in the community. This class of title declared on by the Respondents is purely an equitable title. (Wooters vs. Feeny—12—La. Ann.—449; Patty vs. Middleton—82—Texas—586).

Petitioners contend that the defenses urged by them were but denials of Plaintiffs action.

Before Petitioners should be relegated to a Court of equity and ousted from a Court of law, they should set up something showing a necessity for affirmative relief. Their defenses here, taken in connection with the Plaintiffs suit, show they are not in need of affirmative relief,

D PAGES

but their defenses are simply to the effect that Respondents are not entitled to the affirmative relief they seek.

Before Plaintiffs could recover, they must show that the property sued for is a part of the community. Certainly Defendants could answer this by showing the same to be untrue and by showing any state of facts that would make it untrue, and they certainly ought to be permitted to show this in any Court, in defense of Plaintiffs action. We do not belive it to be the law that Defendants would have to go into a Court of equity to establish the negative of any proposition. In other words we believe that whereever Plaintiffs action is maintainable, a defense negativing this action would be heard. This is the contention of Petitioners here and if correct, the Circuit Court of Appeals erred in not reversing this cause and directing that Petitioners in said trial Court have the benefit of their defenses.

Petitioners contend that under the undisputed proof offered by Plaintiffs in the trial Court a verdict in their favor should have been directed and supporting this contention by the record, we submit: Plaintiffs offered in evidence a deed placing the legal title in their father conveying to him the property in controversy. This deed showed the consideration to be Five Hundred Dollars cash and Fourteen Thousand Five Hundred Dollars evidenced by note. (Tr. 38). They proved the marriage of their father and mother prior to this deed, the death of

BLURRE

the mother after the date of same and their heirship and rested. We do not dispute the presumption that arises from a purchase made during the marital relation, that the property belongs to the community, but this presumption is one of fact and can be overcome by proof to the contrary. (Bartells vs. Shouchon—48—La. Ann.—783; Weymouth vs. Hawtells—34—Pac. Rep.—109).

Petitioners contention, plainly stated, is that the presumption only extends to the property shown by the instrument to have been acquired or whatever interest therein the conveyance shows was acquired, during the marriage relation and in the case at bar, the proof introduced, only showed that the community had an undivided one-thirtieth interest in the land sued for, or an interest of Five Hundred Dollars, of a total of Fifteen Thousand Dollars, consideration. The presumption cannot be extended further than this and as no proof was offered that the community paid the outstanding note or that the same was ever paid, the record shows no evidence from any standpoint, of Plaintiffs right to any portion of the land, but simply, if anything, an equity to the extent of one-thirtieth interest therein.

If this contention is correct and we are willing to submit it as being absolutely correct, then there is no theory upon which the Plaintiffs could be entitled to recover in the suit filed.

Petitioners contend that evidence should have been

admitted as offered by them to show that the lands sued for were held in trust and without beneficial interest by Plaintiffs father.

Testimony of J. A. Lovett was offered as follows:

"The understanding was that W. J. Knight would hold the property for us and that on the surrender of his note and Five Hundred Dollars, he was to deed the property back to us. We made this sale for the purpose of protecting ourselves against our debts. To the best of my recollection, the money belonged to Knight & Lovett, but I cannot be positive about that now. I am not positive that it was as much as Five Hundred Dollars, but I know there was some paid. I do not remember definitely the amount. It was for the purpose of closing that deal. It was returned to him when he transferred a lot of the property back to the parties. In the meantime D. R. Knight and I had dissolved partnership, and also D. R. Knight's wife had sued him for a partition of their property. W. J. Knight transferred to D. R. Knight's wife the interest of D. R. Knight in the land. The proceeds of the sale of the personal property were paid to D. R. Knight and myself." (Tr. 81; see testimony of J. A. Lovett in full).

Petitioners contention here is passed on and fully explained in the case of Crenshaw vs. Harris—41—S. W.—392, and if that case is good law, then the testimony here offered was admissible for the purpose offered and should

BLURR

have been allowed by the trial Court, and error has been committed by both Courts in rejecting it.

Petitioners further contend that the evidence showed them to be innocent purchasers of the property for value and entitled to protection as such.

It is not a disputed fact that Petitioners here are entitled to hold this property as purchasers in good faith if the law permits it. The case of Hensley vs. Lewis—82 —Texas—595; Mangum vs. White—41—S. W. Rep.—80 Crary vs. Field—61—Pac. Rep.—118; all announce the contention of the Petitioners upon this phase of the case as being sound and we know of no law to the contrary, and we submit the contention upon those cases as well as numerous others that might be cited.

ARGUMENT.

This cause stands in this attitude. Respondents have recovered a judgment against Petitioners for an undivided one-half interest in large and valuable tracts of land to which Petitioners have a perfect legal record title, which they bought in good faith and paid value for; without any notice of Respondents rights, and which, for more than ten years they openly asserted title to and paid taxes on. Respondents in a Court of law have recovered these lands on the strength of a secret title, an equitable title, a title coming to them from their mother, because of a presumption of fact that this property was a part of the

D PAGES

community assets of herself and husband. This recovery was had solely on the presumption of fact arising because the deed was executed to the father during the life of the mother and the presumption was extended by the trial Court and Circuit Court of Appeals beyond the deed and beyond the evidence and without testimony to embrace a full undivided one-half interest in the property as against the recitals in the deed to the father that only one-thirtieth interest had ever passed to the community. This judgment was also rendered without permitting Petitioners to offer evidence which would have shown that all interest shown to be in the community was in fact nothing but a naked trust, and that no beneficial interest in the property ever vested in the community. That the consideration paid by them for the property actually went to pay and take up the outstanding obligation shown in the deed to the father, and this upon a theory that these defenses could not be urged in this suit at law and must first be established in equity, this latter holding being one of the Circuit Court of Appeals, contrary to the holding of the Circuit Court in the same cause, in an action brought by these Petitioners against Respondents. We submit that all property rights are too sacred to thus be taken from the owner without an opportunity of being heard in any Court. Some Court is certainly open to them to determine their rights, and as this is the last Court that can guarantee them these rights, we submit that the Writ of Certiorari herein prayed for should be granted and that judgment of both the Circuit Court of

BLURR

Appeals and Circuit Court be reversed with such instructions as will afford these Petitioners safety in their property rights and the right to have their defenses determined in some tribunal that this Court will open to them for that purpose.

Respectfully submitted,

GEO. E. HOLLAND,

A. P. PUJO,

Attorneys for Petitioners.

D PAGES

IN THE

Supreme Court of the United States.

LUTCHER & MOORE LUMBER CO. ET AL.,
PETITIONERS,

vs.

WILLIAM H. KNIGHT ET AL., RESPONDENTS.

Supplemental Brief in Behalf of Petitioners.

May it please the Court:

Respondents' father and mother, William J. Knight and Mary Cain, were *married July 29, 1875.*

The land, the subject-matter of this controversy, was transferred by Knight & Lovett, a commercial firm, composed of Daniel R. Knight and Dr. J. A. Lovett, to W. J. Knight, *July 28, 1882* (Tr., p. 38).

Mary Cain-Knight, wife of W. J. Knight, and mother of the respondents, *died August 7, 1885.*

On February 5, 1887, W. J. Knight transferred an undivided one-half interest in the land to Mrs. Viola P. Knight, the wife of Dan R. Knight, a member of the former firm of Knight & Lovett (Tr., p. 42).

On February 7, 1887, W. J. Knight transferred an undivided one-fourth interest in this land to J. C. Knight, a relative (Tr., p. 41).

On April 13, 1889, Mrs. Viola P. Knight, J. C. Knight, and W. J. Knight, sold the same to the petitioners herein.

Were it not, that in the original brief, the position has been taken that the community interest extended only

in the proportion that the money paid during its existence, bore to the entire purchase price, this supplemental brief would not be presented.

The jurisprudence of Louisiana is uniform that as a general rule all property purchased by the husband during marriage belongs to the community, even if paid for after its dissolution.

Morris *vs.* Covington, 2 Ann., p. 259.

So, where property is purchased during the community and after its dissolution, the title is perfected by the survivor paying the purchase price, the property belongs to the community and the price so paid after dissolution is a community debt.

Mariotte *vs.* Lieux, 41 Ann., p. 817.

In fact, this position was originally recognized by petitioners, as in their amended and supplemental answer (Tr., p. 85), it was urged alternately, that, if the property did constitute an asset of the community, it was liable for the community debts. This answer was not allowed by the court.

In considering a similar question, the Supreme Court of Louisiana, in Tuggle *vs.* Tugwell, 32 Ann., p. 852, said:

> "To set at rest this vexed question we distinctly announce that construing the articles of the Code on this subject in accordance with what we believe to be their plain and express language, we hold that, when the community of acquests and gains is dissolved by the death of the wife, the respective interests of the husband and deceased wife attach at the moment of the dissolution to the property of the community, subject to the payment of the community debts.

Article 2403 of the Revised Civil Code of Louisiana specifically announces that—

> "the debts contracted during the marriage enter into the partnership of community of gains, and

> must be acquitted out of the common fund whilst the debts of both husband and wife anterior to the marriage must be aquitted out of their own personal and individual effects."

In this case the anomalous condition is presented of heirs accepting the succession of their deceased mother, by filing a suit claiming under their heirship, being recognized by judgment of a court of law, as the owners of the property inherited from their mother, and yet denying petitioners the right to have enforced against the heirs the debts due by the community formerly existing between their mother and father. To go a step further: The heirs have unconditionally accepted the succession of their mother by proceeding judicially claiming ownership of the property involved in this suit through inheritance from her.

This acceptance relates back to the opening of the succession, and the effect of their acceptance is to make them responsible for the entire debts of the succession, unless before acting as heir they caused a true and faithful inventory to be made (see arts. 987–988 and 1013, Revised Civil Code of Louisiana).

The transfer from Knight & Lovett to W. J. Knight (page 38 of Tr.) shows that the ostensible consideration was $14.500, of which sum $500 was alleged to have been paid in cash and the residue was represented by a note for an equal amount, payable on the 1st day of November, 1882.

The evidence of Dr. J. A. Lovett, one of the members of the then firm of Knight & Lovett, offered by petitioners and excluded by the trial court, appearing at page 81 of the transcript herein, shows that no accounting was made by W. J. Knight, the ostensible owner of the land, nor payment of the note during the existence of the community, which was terminated by the death of Mrs. W. J. Knight on August 7, 1885.

While we recognize the doctrine that parol evidence is not admissible for the purpose of establishing title to real estate, yet testimony of such character is admissible to show that the note representing the credit portion of the purchase price had not been canceled nor retired at the time of the death of Mrs. Knight.

The main contention of the petitioners in this case is that the property never belonged to W. J. Knight, but that he was merely a trustee for the use and benefit of Knight & Lovett, who had transferred the property to him in order to avoid the pursuit of their creditors.

There is authority for the statement that a trust may be established by parole. It has been held by your honorable court, in Smithsonian Institution *vs.* Meech, 169 U. S., page 405, that the evidence of a single witness, if corroborated by circumstances, is sufficient to establish an oral trust concerning real estate bought by the husband in the wife's name.

Such being the case, the transfers by Knight & Lovett to W. J. Knight; by the latter to Mrs. Viola P. Knight, wife of Dan R. Knight, one of W. J. Knight's original transferors; by W. J. Knight to J. C. Knight, a relative; and finally by Mrs. Viola P. Knight, J. C. Knight and W. J. Knight, the ostensible record owners of an undivided one-half and an undivided one-fourth each, respectively, to petitioners, are strongly corroborative of the testimony of Dr. J. A. Lovett, one of the original transferring partners, that no real title ever passed to W. J. Knight, nor that he ever acquired any interest therein, even to the extent of an undivided one-fourth of the property until 1887, two years after the death of his wife. This testimony, had it been admitted, would have been sufficient to establish the trust relations which W. J. Knight occupied to Knight & Lovett, the real owners of the property.

The exclusion of the testimony was error and parol

should have been admitted to prove that whilst there was a paper transfer and that the ostensible legal title was vested in W. J. Knight, transferee, yet in truth and in fact he was not the owner, but was merely the agent or trustee, of the actual owners.

In the decision above mentioned, Mr. Justice Brewer, the organ of the court, announced the rule to be, with reference to the admissibility of parol testimony to establish a resulting trust, as follows:

> "The general proposition is unquestioned that, where upon a purchase of property the conveyance of the legal title is to one person while the consideration is paid by another, an implied or resulting trust immediately arises, and the grantee in the conveyance will be held as trustee for the party from whom the consideration proceeds."

The nature of the trust created, or sought to be created, by a transfer, the learned justice says, may be established by parol. In the opinion just cited, at the bottom of page 405, we find the following language :

> "While we agree to the proposition that parol testimony to overthrow the legal effect of conveyances must be clear and satisfactory, yet we think that this case comes within the scope of that rule, and that it is certain that just such an agreement was made between husband and wife as the appellant asserts."

It must be remembered that in this case petitioners are endeavoring to show that no property rights whatever were ever vested in the community existing between Wm. J. Knight and his wife, Mrs. Mary K. Knight, which was dissolved by her death in 1885. The respondents in this case are claiming by inheritance as heirs at law of their mother.

It must be borne in mind that respondents, having claimed by this suit an undivided half interest in the

land by inheritance from their mother, have accepted her succession unconditionally, which in the language of the Civil Code of Louisiana—

> "is the transmission of the rights and obligations of the deceased to the heirs." Art. 871.

If the mere fact of placing this tittle in the name of the husband at the time of the existence of the marriage—although he had not paid anything therefor, and although he had agreed to hold it subject to the control of the real owners—brought it into the community so as to transfer the title by inheritance to the heirs of the mother, upon the dissolution of the community by her death, we still insist that her obligations descended to her heirs who are bound to the same extent that her interest in the community could have been bound by a suit brought during her lifetime.

The Supreme Court of Louisiana has held that:

> "It would be monstrous to pretend that the wife or her heirs is a third person to the husband in a technical sense, in the face of the admitted principle that she could control no acts done by him as the head of the community until after dissolution of the marriage, and then only by the express ground of fraud (C. C. 2373; 9 L., p. 452)."
>
> Caldwell *vs.* Henning, 5 Rob., p. 25.

In Smithsonian Institution *vs.* Meech, *supra*, the question at issue for determination was whether property purchased during the lifetime of Mr. and Mrs. Avery, standing of record in her name, but paid for by the husband, belonged to him so as to be the subject of disposition by last will and testament, and the court propounded and determined the following question in the affirmative:

> "If it is true that the purchase price was paid by Mr. Avery, and the title conveyed to Mrs. Avery

under an oral agreement, such as is described, will equity enforce this as against those claiming the record title?"

And parol evidence was admitted *by the court in that case to show the nature of the trust.*

Now if parol testimony is admissible in a case to show that the title to property, although standing of record in the name of one person, belongs to another, because the other person paid for it, why is not parol testimony admissible to show that although the record title is vested in one, no consideration was paid, and that the agreement was that the transferee was to hold it merely for the protection and convenience of the transferors?

In Smithonian Institution *vs.* Meech, supra, the reason why parol is admissible is well stated in a quotation from Perry on Trusts, in the following language:

> "Whether a purchase in the name of a wife or child is an advancement or not, is a question of pure intention, though presumed in the first instance to be a provision and settlement; therefore any antecedent or contemopraneous acts or facts may be received, either to rebut or support the presumption, and any acts or facts so immediately after the purchase as to be fairly considered as part of the transaction may be received for the same purpose. And so the declarations of the real purchaser, either before or at the time of the purchase, may be received to show whether he intended it as an advancement or a trust. Such declarations are received, not as declarations of a trust by parol or otherwise, but as evidence to show what the intention was at the time.
>
> "This is in accord with the general proposition so often enunciated, that the Statute of Frauds was designed to prevent frauds, and that courts of equity will not permit it to be used to accomplish that which it was designed to prevent. As said in Wood *vs.* Rabe, 96 N. Y., 414, 425:
>
> "'There are two principles upon which a court

> of equity acts in exercising its remedial jurisdiction . . . One is that it will not permit the Statute of Frauds to be used as an instrument of fraud, and the other, that when a person through the influence of a confidential relation acquires title to property, or obtains an advantage which he can not conscientiously retain, the court, to prevent the abuse of confidence, will grant relief.'
>
> "And in Haigh *vs.* Kaye, L. R. 7 Ch. App., 469, 474:
>
> "'The words of Lord Justice Turner, in the case of Lincoln *vs.* Wright, 4 De G. & J., 16, where he said: "The principle of this court is that the Statute of Frauds was not made to cover fraud," express a principle upon which this court has acted in numerous instances, where the court has refused to allow a man to take advantage of the Statute of Frauds to keep another man's property which he has obtained through fraud.'"

It is with respect suggested that the showing made by the petition and record warrants the issuance of a writ of certiorari to the lower court as prayed for.

Respectfully submitted.

A. P. PUJO,
Of Counsel for Petitioners.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 101.

LUTCHER & MOORE LUMBER COMPANY AND H. J. LUTCHER, PETITIONERS,

vs.

WILLIAM H. KNIGHT ET AL.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Brief on Behalf of Petitioners, Defendants in Original Suit.

SYLLABUS.

An action instituted by heirs claiming real property through inheritance from their mother, upon the allegation that the property was purchased during marriage and belonged to the community, against the record owner holding under a regular chain of title from the sovereign is a suit in equity, and a court of law is without jurisdiction to herein determine the rights of the parties.

The plea of *res judicata* can not be successfully interposed unless the pleadings in the former litigation show affirmatively:

That the thing demanded was the same; the demand

was founded on the same cause of action; the demand was between the same parties and formed by them against each other in the same quality.

Under the jurisprudence of Louisiana parol testimony is admissible to rebut the presumption that property purchased during marriage belongs to the community.

Under the jurisprudence of Louisiana parol testimony is admissible to show that an ostensible deed of sale was in truth and in fact not a sale, but a transfer charged with a trust to be executed by the trustee in favor of the *cestui que trust.*

Statement of the Case.

This case is before the court on a writ of *cc tiorari* to the United States Circuit Court of Appeals for the Fifth Circuit, to review a decision by it rendered, affirming the judgment of the United States Circuit Court for the Western District of Louisiana, in and by which respondents were adjudged to be the owners of an undivided half interest in and to certain lands of which plaintiffs were the owners by title of record.

March 11, 1903, respondents filed suit against the Lutcher and Moore Lumber Company and H. J. Lutcher (plaintiffs here), in the 12th Judicial District of Louisiana, sitting for the Parish of Vernon, to recover an undivided half interest in certain lands situated in said parish and State, as heirs at law of their deceased mother, Mary J. Cain, wife of W. J. Knight, alleging in substance;

That the lands to which they asserted rights of ownership had been purchased by their father, W. J. Knight, during marriage with their mother, Mary Cain Knight, and under the laws of the State of Louisiana belonged to the community of acquest and gains existing between them; that upon the dissolution of the community by the death of their mother, they as her heirs at law, became the owners of an

undivided half interest in the lands so purchased; that after the death of their mother, their father, without authority of law, sold all of said lands without opening her succession, and that such sales in so far as their interests therein were sought to be affected, were null and void and of no effect.

March 26, 1903, the cause was removed to the Federal Court upon the petition of defendants (plaintiffs here) October 5, 1903, the defendants filed what they called their first "Amended original answer," which was further amended on October 27, 1903 (Tr. 7 and 11).

On October 22, 1903, plaintiffs in said cause filed a special demurrer or motion to strike out certain portions of the answer, filed by defendants October 5, 1903. The record does not disclose what disposition was made of the demurrer.

The original and amended answers presented the following defenses:

(a) No cause of action.

(b) The general issue.

(c) Special denial of the quality in which plaintiffs sued.

(d) That the land sued for was the separate property of their father, W. J. Knight, by gift, had not been paid for by and formed no part of the community.

(e) That the title to the property was in W. J. Knight only as trustee for his vendors, Dan R. Knight and J. A. Lovett, who requested W. J. Knight to act in said capacity on the condition that the property so conveyed to him, in trust, should be held for the use and benefit of Dan R. Knight and J. A. Lovett, to be disposed of whenever directed or requested by them to do so; that W. J. Knight accepted the said trust subject to the conditions imposed and agreed to fulfill the same; that W. J. Knight paid nothing for the land, nor did he execute any note in payment therefor; and that afterwards W. J. Knight at the instance and request of Dan R. Knight and J. A. Lovett for whom he

held the title in trust, and in compliance with the agreement under which he accepted the trust, conveyed to Mrs. Viola P. Knight a one-half interest, and to J. C. Knight a one-fourth interest to the lands, retaining a one-fourth interest for himself; that subsequently Mrs. Viola P. Knight, W. J. Knight and J. C. Knight sold the entire property to defendants, the Lutcher and Moore Lumber Company; and that the conveyances by W. J. Knight was the execution and performance of the trust reposed in him and a compliance with the agreement under which he accepted the same; that when the title to the property was placed in the name of W. J. Knight by Dan R. Knight and J. A. Lovett no real sale ever took place between the parties, the land being received by W. J. Knight charged with the trust stated; consequently the same constituted no part of the community of acquets and gains existing between him and his wife, Mary Cain Knight.

(f) That when the property was purchased by defendants (plaintiffs here) there was no evidence of record, showing the marriage or death of Mary Cain Knight; that at said date W. J. Knight was married and his second wife was living with him; that all transfers affecting the land in question were seasonably recorded in the proper records in the parish where the lands were situated; and that the sales were executed and the purchases made by the defendants in good faith, without notice or knowledge of claims of any kind, or of the previous marriage or death of the first wife of the said W. J. Knight.

(g) That the transfer from Dan R. Knight and J. A. Lovett to W. J. Knight, dated July 28, 1882, was never intended as a sale by the parties thereto; that no money or other consideration was paid for the land therein described; that the transaction was merely a device on the part of J. A. Lovett and Dan R. Knight, commercial partners, then in a failing condition, to screen their property from the pursuit of their creditors; that it never became the property

of W. J. Knight or of the community, but always belonged to Dan R. Knight and J. A. Lovett until, under their instructions, the same was transferred to defendants (plaintiffs here) immediate authors; that the pretended sale was a simulation and a fiction; that all the vendors were closely related, and the proceeds realized therefrom were divided between Dan R. Knight and J. A. Lovett, who advised, counselled and procured the sales to be made.

(h) That the half interest acquired by G. Bedel Moore had been transferred to the Lutcher and Moore Lumber Company; that the defendants were entitled to call their vendors in warranty and to recover the amounts paid by them with interest, likewise the sums paid for taxes.

(i) Defendants prayed for judgment quieting their title and rejecting plaintiffs' demand, and for citation in warranty of their respective vendors, and in the event of eviction, for judgment against the plaintiffs for the amount paid by them for taxes, and against their warrantors for the reimbursement of the purchase price with interest, and attorney's fees incurred in defending suit.

The amended answer filed on October 5, 1903, charged the nature of the transaction between Dan R. Knight and J. A. Lovett and W. J. Knight, dated July 28, 1882, to be the result of an agreement that Dan R. Knight and J. A. Lovett should transfer and convey all the property movable and immovable owned by them to W. J. Knight, who should act as the agent and manager of their business, and of the property of Knight and Lovett; that W. J. Knight was to receive a salary for his service; that the movable property referred to in the transfer was to be converted into money, and an accounting made to Dan R. Knight and J. A. Lovett, and the lands were to be reconveyed to Knight and Lovett or transferred to such persons as they might designate; that said agreement was carried out by W. J. Knight. The movable property was sold by him, and the proceeds realized therefor accounted for to Knight and Lovett; that

the ownership of Knight and Lovett of the lands described in the conveyance of July 28, 1882, was always recognized by W. J. Knight, and in 1887 he offered to reconvey the lands to Knight and Lovett; and that acting under their request and instruction, on February 5, 1887, he did convey to Viola P. Knight, wife of Dan R. Knight, and authorized by him, a half interest in the lands; that at said date J. A. Lovett, former partner of Dan R. Knight, and then half owner of the land, did not desire to have his half interest conveyed to him, but wanted it sold; that the sale was effected to W. J. Knight and J. C. Knight, who purchased the half interest of Dr. J. A. Lovett, and W. J. Knight, who accordingly on the 7th of February, 1887, conveyed an undivided one-fourth interest in said lands to J. C. Knight and retained title in himself for the remaining one-fourth, until which date he owned no interest whatever in said property.

That the $500 cash consideration mentioned in the deed of July 28, 1882, was the money of Knight and Lovett; that the $14,500 note alleged to have been executed by W. J. Knight, representing the credit portion of the purchase price, was never paid in whole or in part; that the recital in the deed of Knight and Lovett to W. J. Knight that $500 of the purchase price was paid in cash, was error and untrue; in fact, no part of the purchase price was then paid, or ever afterwards, by W. J. Knight, or anyone else acting for him; that the transfer to W. J. Knight of said property did not constitute a sale, but only a paper title, and that he never in fact or in law became the owner of the property or any interest therein.

In the closing part of this answer defendants pleaded the prescription of one, two, four, five and ten years.

December 21, 1903, defendants in said cause No. 276, in the U. S. Circuit Court (plaintiffs here), filed an original bill in the Circuit Court of the United States for the Western District of Louisiana relating the nature of the transac-

tions and the history of the proceedings between all of the parties, from which bill the following paragraphs are quoted:

> IX. Your orators further show that the community of acquests and gains existing between W. J. Knight, and his alleged previous wife, Mary Cain Knight, never had any interest in or title to said property, or any part thereof; that W. J. Knight was simply and solely a trustee and agent of Dan R. Knight and J. A. Lovett; that the said W. J. Knight took said title with the distinct understanding and agreement that he would reconvey to said Knight and Lovett said land at any time they requested him to do so, and that if any title vested in said W. J. Knight, it was charged with said trust, and that the said W. J. Knight after the death of his alleged previous wife, Mary Cain Knight, executed said trust by conveying one-half interest in said land to the said Viola P. Knight, and by further conveying one-fourth interest in said land to John C. Knight and also by paying the said John A. Lovett for the remaining one-fourth interest in said land, and that his said alleged previous wife had been dead about two years before the said W. J. Knight ever acquired any real title to any part of said land.
>
> X. Your orators would further show that the (filing) of said suit as hereinbefore alleged, and the setting up of said claim to said land has clouded your orators' title to the same, and that said suit is at law, and that your orators' defenses are equitable, and that the pendency of said suit and the cloud cast on your orators' title work irreparable injury and damage to your orators, and that they have no adequate remedy at law.

The prayer of this bill was special and required the plaintiffs to set forth any and every adverse interest, claim or demand in the land so that the same might be justly adjudicated and declared null and void as against said orators. That orator's title to the land should be established and confirmed against the claims sought to be enforced by plaintiffs

in the suit pending on the law side of the court, and that a writ of injunction issue commanding the plaintiffs to desist from the prosecution of said action at law.

To this bill defendants filed a demurrer to the effect that the complaint came too late; that complainants' answer filed in cause No. 276, if sustained, would be adequate in law; that the allegations of plaintiffs' bill were merely a reiteration of the answer to the action on the law side of the court, which constituted a plea of estoppel; that the bill of complaint disclosed no right of action, and that complainants were without right under the law of Louisiana to file a suit in equity relating to the real estate in Louisiana.

This demurrer was sustained by the court, and complainants' bill in equity dismissed. (Tr. 101, 102.)

No appeal was ever taken and perfected from the ruling sustaining the demurrer, and trial of the case was proceeded with on the law side of the court.

On the trial of the cause defendants offered an amended answer to the effect and in the alternative, that should the sale from Knight and Lovett to W. J. Knight be held valid, then and in that event, the credit portion of the purchase price recited in the deed—$14,500—should be held as a debt against the community chargeable to plaintiffs proportionately, as it had been paid by the proceeds of the sale of the property after the death of Mrs. Mary Cain Knight. This amendment was not allowed by the court, to which exception was taken and perfected by bill. (Tr. pp. 67, 68 and 69.)

The case was tried by a jury upon the issues thus presented. A general verdict was rendered in favor of the plaintiffs. (Tr. p. 57.) The verdict was approved by the court after denial of a motion for new trial, and formal judgment entered thereon decreeing the plaintiffs to be the owners of an undivided one-half interest in the land sued for by them (Tr. p. 58.)

Bills of exceptions were reserved to the following ad-

verse rulings of the court: Disallowing the filing of the amended answer; excluding the depositions of Dr. J. A. Lovett, A. W. McCranie and T. J. Word; refusing to give the special charge requested with reference to the prescription of ten years pleaded by defendants; refusing to charge that before the plaintiffs could recover it would be necessary to show that the community had been liquidated, and to the refusal of the court to grant a new trial. (See bills of exceptions, Nos. 1, 2, 3, 4, 5 and 6, Tr. 60 to 74; No. 2, 67; No. 3, 68; No. 4, 70; No. 5, 71; No. 6, 71.)

The case was brought to the United States Court of Appeals for the Fifth Circuit by writ of error, and the judgment of the Circuit Court affirmed for the following reasons:

> "After a thorough and attentive consideration of the questions raised on this writ, we are of opinion that the matters of defence relied upon by plaintiffs in error on the trial below, in so far as they were not given consideration, were of an equitable nature, not cognizable in a court of law, we therefore affirm the judgment of the Circuit Court."

Then followed the application to your Honorable Court for *certiorari*, resulting in the issuance of the writ.

The Facts.

William J. Knight and Mary Cain Knight were married July 29, 1875.

The land, the subject-matter of this controversy, was transferred by Knight & Lovett, a commercial firm, composed of Daniel R. Knight and Dr. J. A. Lovett, to W. J. Knight, July 28, 1882 (Tr. p. 31).

Mary Cain Knight, wife of W. J. Knight, and mother of the respondents, died August 7, 1885.

On February 5, 1887, W. J. Knight transferred an undivided one-half interest in the land to Mrs. Viola P. Knight, the wife of Dan R. Knight, a member of the former firm of Knight and Lovett (Tr. p. 35).

On February 7, 1887, W. J. Knight transferred an undivided one-fourth interest in the land to J. C. Knight, a relative (Tr. p. 34).

On April 13, 1889, Mrs. Viola P. Knight, J. C. Knight and W. J. Knight sold the land transferred by Knight & Lovett to W. J. Knight, July 28th 1882, to plaintiffs herein.

The deed from the Knights to Lutcher and Moore was filed for record and recorded on April 24, 1889, in Book D, Folios 440 and 441 in the Conveyance Records of the Parish of Vernon (Tr. p. 37).

Although this case was tried on the law side of the court and before a jury, there appears a minute of evidence in the record. Reference thereto clearly establishes the fact that W. J. Knight and Mary Cain were married in 1875, lived together thereafter as man and wife until she died in 1885; that respondents herein were born of that marriage; that plaintiffs exercised acts of possession of the property by recording their deed and paying taxes thereon (Tr. pp. 23-24-25-26-27-30).

Jurisdiction.

Plaintiffs in the original cause, as heirs at law of their mother, assert a half ownership in property to which the defendants in the orginal cause (plaintiffs here), are holders by a regular chain of title from the sovereignty.

The title of plaintiff, if it exists, is equitable, and can not be adjudicated on the law side of the court.

> "Only a court of equity can compel the surrender of a legal title to land held by defendant and invest the plaintiff with it."
>
> Rufman *vs.* Cory, 129 U. S., p. 387.

> "The State practice will not be so far followed as to permit a suit founded upon a right that is purely equitable to be tried upon the Common

Law side of the court; or as to permit an equitable defense; or ~~her~~ equitable set-off to be pleaded in an action at law."

Foster's Federal Practice, Fourth Edition, vol. 2, section 360 (a), sec. 375.

"Legal and equitable causes of action can not be joined in the same suit, although this is permitted by the State practice."

90 Fed. Reporter, p. 711.

"A suit for the cancellation of a deed is equitable."

Foster's Fed. Practice, sec. 2, pg. 5.

Res Judicata.

Res adjudicata is statutory in the State of Louisiana and is defined by article 2268 of the Revised Civil Code of Louisiana, which reads as follows:

> "The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause or action; the demand must be between the same parties, and formed by them against each other in the same quality."

The basis of plaintiff's plea of res adjudicata is the record of certain suits instituted by creditors of Knight and Lovett against them and W. J. Knight, to subject certain property transferred by the former to the latter under the deed of July 28, 1882, to the payment of their debts. The creditors of Knight and Lovett had attached a certain lot of goods, wares and merchandise. W. J. Knight intervened in the case, claiming to be the owner by deed of sale duly recorded in Vernon Parish. On the trial of the case the court held W. J.

Knight to be the rightful owner of the property attached in the suit by virtue of the purchase thereof from the defendants by the act of sale executed July 28, 1882, and which act of sale was decreed to be real and not simulated.

Before an examination into the merits of the plea it is respectfully suggested that the same is not before the court for determination. The plea if good would put an end to the controversy. It should have been tried separately and decided, and was waived by going to trial on the merits without insisting on a separate trial.

Singleton *vs.* Smith, 4 La., 432.
Pearce *vs.* Frantum, 16 La., 414.

But if the plea is before the court, the facts in support thereof do not warrant that it should be sustained. It must be borne in mind that in this case the original plaintiffs assert that the land transferred to their father was acquired by him during marriage and became community property, one-half of which descended to them by inheritance from their mother. They deny that their father had the right to sell the property after the death of his wife, Mary Cain Knight, their mother. The defense urged, is that their father and consequently the community, acquired nothing by the transfer to him.

The thing demanded was not the same; the demand was not between the same parties and in the same quality.

The creditors in their attachment proceedings against Knight & Lovett, seized certain goods and merchandise. Their inquiry under the law was confined to the question whether the sale to W. J. Knight, the intervenor, of the goods attached, was, or was not, a simulation. For aught we know Knight might have shown the payment by him for the goods attached. It does not follow that if a con-

sideration existed for the transfer of the merchandise that a consideration also existed for the transfer of the land.

In support of the plea of res judicata there was no testimony offered to show whether the legality of the title to the real estate was in issue in the creditor's proceedings against Knight & Lovett, in which W. J. Knight intervened; or, even if the matter were in issue, whether the decision turned upon some other point in the case.

Such being the case we respectfully submit that *res judicata* does not apply.

Werlin *vs.* New Orleans, 177 U. S., p. 390.
Fincke *vs.* Martin, 5 La. Ann., 103.
Johns *vs.* Race, 48 La. Ann., 1170.

ARGUMENT.

May it please the court: The several assignments of error, present directly and indirectly for decision, the question whether parol testimony is admissible to show that real property acquired in Louisiana, during marriage, does not belong to the community of acquets and gains existing by virtue of the laws of that State, between the spouses. They will therefore be considered as one in the submission of the case.

The record shows that upon demurrer by defendants in cause No. 286, in the U. S. Circuit Court for the Western District of Louisiana, to plaintiffs' bill praying for an injunction against the further prosecution of cause No. 276, it was held that said cause was properly in a court of law, and the bill for injunction was denied. This ruling of the court was provoked by the respondents here, plaintiffs in the original action, and acquiesced in by the defendants there (petitioners here) and became *res judicata* as to them. The

effect of this ruling was to place the case on the law side of the court to be there disposed of according to the rules of practice governing the trial of such cases in the state of Louisiana. (U. S. R. Stats., Sec. 914.)

The issue created by the pleadings in this case is, whether the property sued for belongs to the community existing between W. J. Knight and his said wife, Mary Cain Knight, mother of the claimants, through whom plaintiffs claim as her heirs at law.

Article 2402, Revised Civil Code of Louisiana, reads as follows:

> What Belongs to the Community—This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase.

It will be noted, the law declares that

> "* * * the estates which they may acquire during marriage * * * by purchase, or in any other similar way"

shall fall into the community. The above provisions of the law relied upon by the plaintiffs in said cause No. 276, establish such resultant ownership upon two conditions: First, that the property shall be acquired during marriage; second, that this acquisition shall be

> "* * * by donations made jointly to them both or by purchase, or in any other similar way." * * *

It is worthy of attention that the statute does not say

that all property placed in the name of either husband and wife during marriage, shall fall into the community. On the contrary, the community of acquets or gains consists only of that which may have been donated to the spouses jointly, or may have been purchased by them, or acquired in some other way in which property is usually acquired, such as by exchange, or in payment. The jurisprudence of Louisiana is uniform upon the proposition that the mere fact of the acquisition during marriage does not necessarily make the property fall into the community, but merely creates the presumption that the same belongs to the community. This presumption may always be rebutted by competent proof.

It has been held, though it be not so stated in the act, that the wife may show that property acquired in her name was purchased with her paraphernal funds under her own administration. When so established by proof the property is paraphernal and does not belong to the community. (30 An. p. 167; Succession of Rinard *vs.* Holtin.) Parol proof is admissible to establish such fact.

The contention of the defendants in the original cause was that, although the title to the property had been acquired by W. J. Knight, yet in truth and in fact, he had never owned it, had never paid anything therefor, was a mere trustee or agent of Knight and Lovett, one of the holders in the chain of title, under whose instructions he acted in transferring three-fourths of the property to their immediate authors, Mrs. Viola P. Knight and J. C. Knight; and that W. J. Knight had acquired his one-fourth interest in the property in 1887, after the death of his wife; and that by reason of these facts the property, although placed in the name of W. J. Knight during marriage, had not fallen into the community.

The trial court permitted the claimants to introduce evidence to prove the marriage of their mother to W. J. Knight, the date of her death, and the transfer by Knight and Lovett to their father, W. J. Knight, of the property in question;

but when the defendants in the cause offered parol testimony to show that the property was never purchased by W. J. Knight, ostensible vendee in the sale from Knight and Lovett, objection was sustained to the admissibility of parol proof to establish such fact, and defendants were not permitted to rebut the presumption of the community flowing from the transfer of the property to W. J. Knight during marriage.

The actual result of this ruling by the court, was to deny to the defendants in the cause the right to substantiate the defence to plaintiffs' action, set up in their answer. The case was at law, the court had so ruled at the instance of the plaintiffs. The defendants at law had the right to prove any fact by competent testimony which would tend to defeat plaintiffs' right to recover, and the exclusion of parol testimony by the trial court and the affirmance of such ruling by the Court of Appeals on the ground that the defences were not cognizable in a court of law, was prejudicial error.

The evidence offered by the defendants to show that the transfer to Lovett was not a sale, but merely an arrangement between Knight and Lovett, the owners, and W. J. Knight, the transferee, whereby the latter would handle and dispose of their property for their benefit and in accordance with their instructions, was not for the purpose of establishing title to real estate, but to rebut the presumption that the property belonged to the community because purchased during marriage.

The court did not state its reasons for maintaining the objection to the admissibility of this testimony, but objection was made that parol testimony could not be admitted to "change, vary or prove title to real estate," and was no doubt based on Articles 2275 and 2276 of the Revised Civil Code of Louisiana, requiring

"transfers of immovable property to be in writing

* * * and prohibiting the admission of parol evidence against or beyond what is contained in the case."

Parol evidence, however, was admissible under the jurisprudence of Louisiana, as we construe it, and likewise under that of other jurisdictions.

It will be borne in mind that defendants in said original cause (plaintiffs here) as to W. J. Knight, and likewise as to respondents, were and are third parties holding under title translative of property, without notice, and for a valuable consideration.

In their answer upon which the case was tried it was in substance set forth that W. J. Knight was a substituted person, holding for the real owners, Knight and Lovett; that the transfer to him was without consideration, never intended as a sale, and was merely a fraudulent device to screen their property from the pursuit of their creditors, and was a simulation and a fiction. The real attitude of the claimants herein is to benefit by the conveyance of Knight and Lovett who transferred their property to their father, W. J. Knight, in order to screen it from the pursuit of their creditors. Parol is always admissible to show simulation (29 An., p. 507; Herbert et al *vs.* Ledge et al.; p. 17, Brief).

Third persons may prove fraud and simulation by parol in the acquisition of real estate (34 An., p. 1243; Tell *vs.* Fish; 4 Robinson, 291; Tutorship, 4 R., or Hackett).

The transfer of 1882 by Knight and Lovett to W. J. Knight was a simulation as a sale; and in truth and in fact was the creation of a secret trust and in fraud of the law. If Dan R. Knight and Dr. J. A. Lovett had died before disposition by W. J. Knight of the property transferred to him, their heirs could have brought a bill alleging the secret trust and the reason whereof, and W. J. Knight would have been compelled to answer, notwithstanding the statute of frauds.

> "If a testator make a devise, or a grantor a conveyance, upon a secret trust in fraud of the law, or for a purpose forbidden by law, or contrary to public policy, those interested may bring a bill alleging the secret trust, and the fraud upon the law, and the persons to whom the devise or conveyance was made must answer, notwithstanding the statute of frauds. If such fraudulent trust appear by the answer, or by any clear and explicit proof in opposition to the answer, a trust will be declared and enforced in favor of those interested in the estate, or in the event of the failure of the illegal trust. In all cases of actual fraud parol evidence is admissible, otherwise a fraud put in writing would always escape."
>
> Perry on Trusts, Sec. 216, p. 313, Vol. 1.

It is no longer questioned but that a trust may be established and proved by parol, Secs. 75 and 76, Perry on Trusts.

Our contention, however, goes further. The agreement under which the lands were transferred by Knight and Lovett to W. J. Knight in 1882, creating a trust or an agency in the said W. J. Knight, as the case may be, although offered to be proved by parol only, was continuously recognized and executed by him in writing, by sale from him to Viola P. Knight and J. C. Knight in 1887. Both of these sales had been directed by Dan R. Knight, half owner, and Dr. J. A. Lovett, owner of the other half of the land, who at that time disposed of his half interest to J. C. Knight and W. J. Knight.

The defences made were strictly within the law, and the evidence should have been admitted in support thereof.

> "Sometimes a proof of the fraudulent intent depends upon the establishment of a secret trust between the parties, and in all cases when a fraud is established a grantee is treated as a trustee for the creditors. Such a trust, however, is not a trust between the parties to the transaction to be set up and enforced by the *cestui que trust* or his representatives.

> It is a question of fraud by reason of a secret transaction with fraudulent intent affecting the validity of the transfer. Hence, the doctrines of the law as to the proof of a trust, whether it may be by parol or must be in writing, are not involved. The question is one of fraudulent intent, and such intent may be proved by any kind of evidence by which fraud may be proved."
>
> Bump on Fraudulent Conveyances, 4th Ed., Sec. 592.

But admitting *arguendo* that parol testimony was not admissible to show that the transfer from Knight and Lovett to W. J. Knight, was the result of fraudulent conspiracy between the parties, for the purpose of placing the property beyond the reach of their creditors, and was in truth and in fact not a sale, but merely a sham, for the reason that such fact could only be established in writing, yet the right would still inhere in the defendants to show that the property transferred by W. J. Knight, although acquired during the marriage, did not belong to the community. The claim that the same did belong to the community was the foundation upon which original plaintiffs based their rights. If the property did not constitute a part of the community, they had no right of ownership therein. This was a fact to be proved by the plaintiffs as a condition precedent to recovery.

After the testimony of plaintiffs had been introduced in the cause, defendants had the right to have their day in court, upon the vital matter at issue. This was denied to them by the rejection of the evidence offered to show that the property constituted no part of the community. The deposition of Dr. J. A. Lovett, which should have been received in evidence, shows that W. J. Knight at the time of his purchase was a clerk and employee of Knight and Lovett; that he was related to Dan R. Knight; and was to exercise the duties of a trustee, or agent, for compensation. These facts have material bearing upon the contention of

the defendants and should have been considered by the jury. The testimony bears out defendants' theory that the community of acquets and gains resulting from the marriage *quo ad* the property in question "possessed nothing, earned nothing, invested nothing." (Succession of Rogge, 50 An., p. 1228.)

In the same decision the court applied the principle that parol evidence was admissible to show that the property did not belong to the community, using this language:

> "While it is true that property purchased during marriage, whether in the name of the husband or wife, is presumed to belong to the community, it is a presumption which may be rebutted."
> Succession of Rogge, 50 L. An., p. 1227.

Again:

> "It is a well settled question that the property acquired during community is presumably community property; without dissent, doctrine and jurisprudence sustaining that principle. It has, none the less, frequently been decided that it is by no means a conclusive presumption; that it may be shown by competent evidence that it is the property of one of the spouses and not at all the property of the community."
> 48th L. An., p. 785.

If it can be proved that the property purchased during marriage does not belong to the community but is the property of one of the spouses, why can it not be shown that it is not the property of either?

> "The spouses, parties to acts of purchase, have sometimes imagined that the declaration contained in the act was sufficient to sustain the title claimed; in other words, if the declaration was in the act property bought with the separate funds of the wife, it carried with it the title. In disapproval of this

> heresy this court has said that 'the' married woman must produce proof *dehors* the act of sale to establish her title."
> (See 48 L. An, pp. 783 and 785.)

The heirs at law of Mary Cain Knight claim half ownership of the property in question because it was transferred to their father, W. J. Knight, during marriage. The Louisiana Supreme Court in determining whether or not property belongs to the community has said:

> "Where property has that character the burden rests upon the wife or husband who claims it as a separate estate to establish ownership by positive evidence, *dehors* the recital of the act, which alone proves little or nothing. This is done by proving not only the origin of the facts *provenance des deniers*, but also the actual investment of the same. This is required whether the claim be raised as against creditors, heirs or anyone else."
> (35 L. An., p. 571.)

To recognize the rights of claimants and respondents, asserted herein, would be to permit them to profit by the acts of their father, who entered into an illegal arrangement with his transferors, Knight and Lovett, by which the former avoided the payment of their just debts to their creditors, and the latter had property placed in his name, for which he paid nothing, and which was purchased in good faith by petitioners herein. W. J. Knight never held the property under any other color or right than as trustee. Even without agreement there would have been an implied obligation on his part to return the property to the transferors, the original owners.

In Gaines *vs.* Chew, 2d Howard, 648, the court stated the case to be as follows:

> The plaintiff sets up a claim under the law of inheritance to lands, slaves, and a variety of movable

property; that these are proper subjects for the exercise of the jurisdiction of district courts can not be doubted; but the petitioner proceeds further, and alleges the nullity of the will, which constitutes the very title under which the defendant holds property in controversy. Before what court then must the validity of this will be tested? * * *

If the fraud shall be established against the executors, and a notice of the fraud by the other defendants, they must be considered, though the sales have the forms of law, as holding the property in trust for the complainants. Under these circumstances a suit at law could not give adequate relief. A surrender of papers and a relinquishment of title may become necessary. The powers of a Court of Chancery, in this view, are required to do complete justice between the parties.

This remedy under the Louisiana law, and before the Louisiana courts, of ordinary jurisdiction, would be undoubted. For, although those courts cannot annul the probate of a will, when presented collaterally, as a muniment of title, they inquire into its validity. Under the peculiar system of that state the forms of procedure being conformable to the civil law, are the same in all cases. But the Circuit Court of the United States, exercising jurisdiction in Louisiana, as in every other State, preserves distinct the common law and chancery powers. In either the State or Federal court the relief is the same; the difference consists only in the mode of giving it.

It is insisted that trusts are abolished by the Louisiana code, and that, consequently, that great branch of equity jurisdiction cannot be exercised in that State.

Art. 1507 of the Civil Code declares: "That substitutions and *fidei commissa* are and remain prohibited." "Every disposition by which the donee, the heir or legatee, is charged to preserve for, or to return a thing to a third person, is null, even with regard to the donee, the instituted heir, or the legatee," etc.

This abolishes express trusts, but it does not reach

> nor affect that trust which the law implies from the fraud of an individual who has, against conscience and right, possessed himself of another's property. In such a case the Louisiana law affords redress as speedily and amply as the law of any other State. There is, therefore, no foundation for the allegation that an implied trust, which is the creature of equity, has been abrogated in Louisiana. Under another name it is preserved there in its full vigor and effect. Without this principle, justice could not be administered. One man possesses himself wrongfully and fraudulently of the property of another; in equity, he holds such property in trust for the rightful owner.
>
> Howard's Reports, Vol. 2, p. 650.

Considering the case from either point of view, as a suit in equity or an action at law, the original defendants were entitled to make their defences by parol proof. Mr. Story says:

> In the next place the same general rule prevails in equity as at law, that parol evidence is not admissible to contradict, extend, or vary written instruments; and that the interpretation of them must depend upon their own terms. But in case of accident, mistake, or fraud, Courts of Equity are constantly in the habit of admitting parol evidence to qualify and correct, and even defeat the terms of written instruments.
>
> So they will allow parol evidence to rebut a presumption, or any equity arising out of written instruments. But in these latter cases they do not interfere with or repel the proper construction of the instrument itself, but only the artificial rules of presumption or of equity, which they themselves have created or applied to cases perfectly indeterminate in their nature, and admitting of either construction according to the real intent of the party. (Story Equity Jurisprudence, Sec. 1531, Vol. 2, p. 857, 13th Ed.)

It will be noted that this eminent authority declares parol

evidence admissible "to rebut a presumption." This principle, as shown by the authorities heretofore cited, has been crystallized into the jurisprudence of Louisiana. In Bachino *vs.* Coste, 35 Ann., p. 572, the court said:

> "This is an action to compel compliance with the terms of sale of a piece of property adjudicated to the defendant. * * * The property was purchased in the name of the plaintiff during marriage; the act contains recital of the origin of the funds with which it states the acquisition was made, and it was signed by the husband. The latter died a short time before the adjudication of the property to the defendant, leaving four children, the issue of his marriage with the plaintiff, two of whom were minors."
>
> The defence was that the property was presumed to belong to the community.

The court in commenting upon the obligation of the wife, plaintiff in that case, to show beyond the recitals of the deed to her of the property that the same had been purchased with paraphenal funds, said:

> Requiring such proof from a married woman is imposing upon her no unauthorized or unjust hardship, or putting her to no undue convenience.
>
> It may happen that property may stand in the name of a married woman so that her title may be indisputable on its face. For instance, where the same changes anterior to the marriage, or is mentioned in the contract of marriage, in whatever character, or was inherited by or donated to her before marriage; but this is not invariably so.
>
> Where, however, she has invested funds truly paraphenal during marriage in a piece of real estate, and she offers to sell it, and her offer is accepted, it would be impossible for her to prove her title on the face of the act. She would necessarily be driven to extraneous proof, written or oral, or both, as the case may be; but the purchaser who has agreed to buy must submit to that sort of evidence.

We submit that the same rule applies to plaintiffs in the

original cause, respondents here. They claim by inheritance the ownership of property bought by their father during marriage. Under the law of Louisiana property so purchased is presumed to belong to the community. But the holders of title by purchase from their father, without notice of any equitable claim against the property, are entitled to rebut the presumption flowing from its acquisition during marriage. This is no longer an open question under the jurisprudence of Louisiana. A case recently decided by the Supreme Court of that State seems to settle the question absolutely.

A father purchased a lot of ground in the city of Crowley, La., in the name of his minor daughter. In the act of purchase it was declared that the father represented his daughter as natural tutor. The lot was subsequently sold by her father before the minor became of age, passing through several hands, until it became the property of defendant Lawrence. After attaining the age of majority the former minor instituted suit, claiming ownership on the ground that the sale made by her father was a nullity.

> The defendant invoked his good faith and the good faith of his authors. He avers that plaintiff's father acted without authority of law in placing the property in her name, and that he did it in order to protect it from the pursuit of creditors; that it was put in his name as the natural tutor of plaintiff but that it was for his benefit and advantage. He charged that the purchase was a simulation, and that the father was absolutely insolvent. La. Reps. 118, p. 462.

Upon trial of the cause verbal testimony was admitted over the objections of the plaintiff; that it proved title to immovable property by parol. In passing upon the objection, the Supreme Court held the evidence to have been properly admitted, citing Gaidry *vs.* Lyons, 29 La. Ann., p. 4; Frazer *vs.* Pritchard, 6 La. Ann., 728; Steward *vs.* Looney & Wells, 23 La. Ann., 624.

In considering the admissibility of parol evidence, the court said:

> Proof of insolvency also was admissible. To prove motive the verbal testimony was admissible. Defendant was resisting in a legal manner, he was on the defensive and was not attempting to prove the legality of his own title.
>
> Plaintiff has never been the owner of the property, and the purpose of the verbal testimony was to show that fact. Plaintiff's father had no authority to buy in her name. The property was owned by some one. Who was it? Not the daughter; for the tutor is without authority to buy immovable for his minor child. Succession of Mitchel, 33 La. Ann., 354; Civ. Code, Art. 353; La. Reps. 118, p. 463.

The language of this decision just quoted applies with peculiar force to the facts under consideration in this case. W. J. Knight was never the owner of the property transferred to him by Knight and Lovett, and the purpose of the deposition of Dr. J. A. Lovett and the proffer of the witnesses, T. J. Word and A. J. McCranie, was to prove that fact. The testimony was competent and should have been received by the court. It was claimed by the plaintiff in the Lyon case that the first purchaser of the lot well knew that the father was acting as a natural tutor of his minor daughter; that this fact was recited in the act, and that he could not contend that the property belonged to the father and not the daughter. The court in considering this phase of the case said:

> But it also appears by verbal testimony that the knowledge which the first purchaser had of the fact that the vendor was the natural tutor, is supplemented with his evidence that the father had told him that his purpose was to buy the property and place it in the name of his daughter in order that it might be protected from all possible claims of his creditors, and that it was a purchase made by the father for his own account. La. Reps. 118, p. 464.

On the trial of this case as against these heirs who claim by inheritance from their mother, it is competent to show, and the defendants in the original cause had the right to prove by parol, that when W. J. Knight transferred the property to Mrs. Viola P. Knight and J. C. Knight that no consideration was paid by them to him; that the only consideration whatever that was paid was from J. C. Knight to J. A. Lovett, and by W. J. Knight to J. A. Lovett for his half of the property, and that the said transfers by W. J. Knight was in conformity with the instructions and directions of the real owners of the property for whom he held title.

It will serve no useful purpose to multiply authorities upon the point under discussion, as the right seems to be well recognized both in suits in equity and actions at law that parol evidence is admissible under the pleadings in a case of this nature. Wherefore, petitioners respectfully submit that the judgment of the Circuit Court of Appeals and of the Circuit Court for the Western District of Louisiana should be annulled, avoided, and set aside, and the case remanded to be proceeded with according to the views and instructions of your Honorable court.

Respectfully submitted.

A. P. PUJO,
GEO. E. HOLLAND,
Of Counsel.

APPENDIX.

Extract from Brief of Counsel for Plaintiffs in Error when the Cause was Submitted to the Circuit Court of Appeals.

ARGUMENT.

I.

This case having been reversed on the former appeal by this court on account of the petition for removal from the State Court being defective, and upon its return to the Circuit Court, such petition having been amended upon leave of that court, and in that court, the question is submitted whether or not such proceeding was proper and did the Circuit Court by such amendment retain and hold jurisdiction of the cause. This is submitted without argument and at this stage of the proceedings because the question is a necessary one to be determined.

II.

The true consideration for a conveyance of land can be shown by parol, even if it varies or contradicts the recitals in the deed.

The foregoing proposition, we submit, is almost elementary, and under it the testimony sought to be admitted on the trial of this cause was admissible. None of the objections offered to that testimony were relevant. It has been too often decided that it does not vary or contradict the deed to show by extrinsic evidence the

true consideration to be seriously considered. The question of res judicata has absolutely no bearing on the question whatever.

> "That parol evidence is admissible to show notwithstanding the acknowledgment of the receipt of purchase money in a deed, that the money was not in fact paid, is well settled."
>
> Gibson *vs.* Fifer, 21 Texas, 263.

Parol evidence is admissible to determine the character of the estate.

Higgins *vs.* Johnson's Heirs, 20 Texas, 389.

The real consideration for a deed may always be inquired into.

Irvine *vs.* McKeon, 23 Cal., 472.

III.

The presumption arising from the conveyance of real property to the husband during the marriage partnership that it belongs to the community can be rebutted by any relevant evidence showing such presumption untrue.

The presumption that property bought during the existence of the Community is community property may be overcome by proof.

Bartells *vs.* Souchon, 48 La. Ann., 783.

The presumption that the property acquired by the husband or wife during the existence of the marital relation is community property is not conclusive, but may be overcome by evidence.

Weymouth *vs.* Hawtells, 34 Pac. Rep., 109.

The presumption that all property acquired by either

spouse during the existence of the community belongs to the community is not conclusive, but may be rebutted.

Smith *vs.* Smith, 73 Am. Dec., 533.
Althof *vs.* Conheim, 38 Cal., 233.
Smalley *vs.* Lawrence, 9 Rob. (La.), 210.
Ford *vs.* Ford, 1 La., 201.
Labbe's Heirs *vs.* Abat, 22 Am. Dec., 151.
Bryan *vs.* Moore, 13 Am. Dec., 347.
Bachino *vs.* Coste, 35 La. Ann., 570.
Moore *vs.* Stauset, 36 La. Ann., 819.
Wood *vs.* Wheeler, 7 Texas, 20.

And such was the Spanish law.

Scott *vs.* Ward, 13 Cal., 471.
Yeats *vs.* Houston, 3 Texas, 452.

If it can be established that property purchased during the marriage was purchased with separate funds, it remains separate property.

Moore *vs.* Moore, 63 Cal., 12.
Dominguez *vs.* Lee, 17 La., 295.

It may even be shown by extrinsic parol testimony that property standing as the separate property of one of the spouses is in fact community property and subject to the payment of community debts.

Pontiac Buggy Company *vs.* Dupree, 56 S. W., 703.

Other cases bearing upon the proposition, see—

In re Boody's Estate, 51 Pac. Rep., 634.
Word *vs.* Owens, 48 S. W. Rep., 200.
Succession of Rogge, 50 La. Ann., 1220.
Neiher *vs.* Arnigo, 54 Pac. Rep., 236.
Mannings *vs.* Burke, 107 La. Ann., 456.
Strong *vs.* Eakin, 66 Pac. Rep., 539.

The authorities cited are only a few out of the great mass of authority holding that the legal presumption

mentioned can be rebutted. The presumption is not conclusive, but simply, like any other presumption of fact, can be overcome by preponderance of the evidence. Defendants in this cause were certainly entitled to have their testimony weighed by the jury, and under a proper charge have the jury by their verdict determine whether or not the testimony offered overcome the presumption that the property was the community property of William J. Knight and his deceased wife. Upon defendants' theory it was never the property of the community and never was intended to be, and the community had no beneficial interest in it, and plaintiffs relied solely on the presumption of law to establish their claim and it is obvious that defendants should have been permitted to introduce their testimony to rebut the presumption and show their defenses to be true. Plaintiffs stood in no better position than their mother during her lifetime and had she been divorced from her husband and sought to divide this property, claiming it to be community, it would not be claimed, we take it, that she would be entitled to any interest in it. The property was not acquired in any manner that would make it onerous. It was in the nature of a gift. Its character was very well stated in the case of Velten *vs.* Carmack, 20 L. R. A., 101. Plaintiffs had the burden of showing title in themselves. Certainly any proof by defendants that would rebut a presumption that they had little would be admissible.

IV.

Where a purchaser acquires all paper title to real property, there is no inhibition against his showing by any relevant testimony that his title is good against and superior to any title not apparent in the chain.

It will be borne in mind by the court that defendants hold their title by regular chain of conveyance from the

sovereignty. Their chain is perfect and without apparent flaw or blemish. Defendant's claim is through a title not apparent of record and not discoverable from any investigation of the lands or the title.

It is no contradiction or variance of a deed to introduce parol evidence to show that the real consideration of the deed was separate property.

Peck *vs.* Vandenberg, 30 Cal., 42.

Land conveyed by bargain and sale to a married woman, although prima facie common property, may be shown to be separate property by extrinsic evidence that it was intended as a gift, and such evidence does not contradict or vary the deed.

Higgins *vs.* Higgins, 46 Cal., 259.

Parol evidence is likewise admissible to show that a gift, though joint to the husband and wife on the face of the deed, was intended and should operate only as a gift to the wife.

Dunham *vs.* Chatham, 21 Tex., 244.

V.

Where during the marriage relation land is deeded to the husband showing the purchase money unpaid, the legal title remains in the vendor, and there is no presumption that the land belongs to the community unless it is shown that the purchase money has been paid.

The above proposition presents an equitable doctrine. The ownership in the property is shown by the conveyance to be qualified and limited; the interest owned is apparent. In the deed under consideration the price was $15,000, $500 of which was paid, and so far as the record shows and the facts are, the $14,500 was never paid, except by the sale of the land. Under this state

of facts upon the face of papers, the community could only own a one-thirtieth interest in the land, or to put it plainer would only have a charge against the land for the sum of $500. It might be that if the land should be sold for profit the community would be entitled to the profit, but no such state of facts exists. The record here shows the superior title was never in the community. It shows that only one-thirtieth of the purchase price was ever paid and further testimony was offered to show that no part of the purchase price was ever paid by the community.

Until payment vendor has superior title.

Howard *vs.* Davis, 6 Texas, 174.

Where the purchaser has long been in default, his vendor being the possessor of the superior title, may make valid conveyance of the land.

Thompson *vs.* Robinson, 93 Texas, 170.

The equitable estate of the vendee, where the purchase price is not fully paid is alienable, descendible, and devisable in like manner as real estate held by legal title, but his title is an equitable one, the legal title remaining in the vendor until the payment of the purchase price.

Lewis *vs.* Hawkins, 23 Wall., 119.

It follows from the common doctrine of trustees that where one purchases with funds belonging to another and takes the title to himself, and when in trust for him who furnished the money, and where but a part of the money is furnished, the equity attaches pro tanto.

McAllister *vs.* Farley, 39 Tex., 552.

Real property purchased by a married woman in her own name, partly with money belonging to her becomes

in part the separate property of the wife and in part community property.

Loring *vs.* Stuart, 21 Pac. Rep., 65.
Schuyler *vs.* Broughton, 70 Cal., 282.

Property purchased in the name of the wife partly with funds of her separate estate and partly with money borrowed during the existence of the community, is the separate estate of the wife to the extent to which funds of her separate estate are used and community property to the extent to which such borrowed money is used in its purchase.

N. & P. H. Bank *vs.* Rauch, 61 Pac. Rep., 516.

VI.

Where plaintiffs claim title to land as heirs of their mother against purchasers from their father who holds the regular paper title, and introduce such regular title into the defendants, proof of the death of the mother prior to the sale by the father coupled with the presumption of fact arising from the deed to the father being in the lifetime of the mother making the property community, is not sufficient to permit a recovery where in the deed to the father it is shown that only one-thirtieth of the purchase price has been paid and twenty-nine thirtieths has not been paid, and the superior legal title is never shown to have passed.

Plaintiffs' entire claim is based on a presumption. Before a presumption can arise that the community owns property, it must be shown that it has acquired it. An interest in property may be acquired by purchase and the payment of one-thirtieth of the consideration, but it is a self-evident proposition that the entire property is not acquired by any character of title, onerous or lucrative, and no presumption could arise vesting title under such a conveyance. At best the presumption

of ownership could only extend to the interest apparent and in the case at bar, an undivided one-thirtieth. There is absolutely no evidence of or contention that the community of William J. Knight and his wife ever owned or claimed the unpaid twenty-nine-thirtieths in the land sued for and surely his heirs could not recover it. The burden would rest in the absence of a presumption on the plaintiffs to show that the community owned the property sought to be recovered, and in this case, that the purchase price had been paid during the existence of the community or at least afterwards, either positively or by presumption with community funds. We submit that this proposition is self-evident.

VII.

Lands held by the husband in trust for others and in which he has no beneficial interest, are no part of the community property of himself and wife.

If the lands in controversy were held by William J. Knight in trust for others, and it is permissible to show this fact, then plaintiffs could not recover, the entire title being based and resting upon the good faith ownership of the lands by the community

In a well considered case where the father had conveyed lands to his son by absolute deed without retaining any lien, reciting an adequate, valuable money consideration as paid, during the existence of the marriage relation between his son and his son's wife, the question arose as to whether or not this property was community property. The presumption of law was that it was. The facts established conclusively the sale and conveyance during the marriage relation. Testimony was offered and admitted to the effect that no actual consideration was passed, but that the conveyance was made by the father to the son simply as a trust, placing the title in the son

so that he could qualify as a bondsman of the father as postmaster. In passing upon the case, the court say:

> "The testimony admitted, it is clear, that the deed to N. W. Harris, if effective at all to pass the title, passed it to him solely in the capacity of trustee and no such partnership or community interest vested in him or his wife as would warrant the recovery sought."
>
> Crenshaw *vs.* Harris, 41 S. W., 392.

Parol evidence is admissible to show that no consideration was paid for a deed, the grantee being a mere conduit and title in a third person for the purpose of showing that the grantee's wife had no right of dower.

Fontaine *vs.* Boatman's Savings Inst., 57 Mo., 552.

When a person, to avoid payment of an anticipated judgment, conveys his property to a friend under a secret trust, who, after the grantor's death, conveys it to his executors, parol evidence may be given by the widow in an action for her dower, that no consideration was paid for the first deed to establish the fact that the grantor died seized of an equitable estate or inheritance.

Brown *vs.* Pitney, 39 Ill., 468.

Parol evidence is admissible to show that the consideration in a deed reciting a valuable one was the interest of the grantee's wife in the land and the giving by her of other deeds for the purpose of showing a resulting trust in her favor in an action by her heirs.

Nichols *vs.* Nichols, 133 Pa., 438.

The case of Vellen *vs.* Carmack, 20 L. R. A., 101, was a case wherein the deed from a father to his daughter expressed a money consideration, but was in fact a donation and this was shown by parol testimony, the court using the following language:

> "So parol testimony is admissible to show that a deed expressing a money consideration was in

> fact an advancement. Such testimony is offered not for the purpose of contradicting the recitals of the deed, but to show in a settlement among the heirs that one or more has already received a certain amount by way of advancement and should not have an equal share of the remainder."

Citing Brummet *vs.* Weaver, 2 Oregon, 170, the court announces the rule that a married woman may change one species of her property for another and to impress upon it the character possessed by the original property and that by this rule the source from which a married woman derived property may be inquired into for the purpose of ascertaining the means whereby the title to the property had been acquired and under this rule, it is competent to show the real consideration for the conveyance, not for the purpose of contradicting the deed, because no question is raised as to its genuineness, but for the purpose of showing the source from whence the real consideration sprung.

This case with its note is an instructive case on the proposition submitted to the court.

VIII.

It can always be shown by parol that lands standing in the name of one spouse are held in trust for others, and that such spouse or the community has no beneficial interest.

This proposition follows necessarily if the foregoing proposition, No. 7, should be established, admitting proposition No. 7 to be good law, this proposition becomes necessary to enforce it.

In an action by the grantor to recover the consideration recited in a deed, parol evidence is admissible that the only consideration was a promise by the grantee to hold the property in trust for the grantor and his children.

Toomey *vs.* Crowley, 137 Mass., 184.

In an action to determine whether a pauper was granted a settlement in a certain Parish, parol evidence is admissible that the consideration of two guineas recited in a deed to him was not paid, but that the property was a gift from his wife's father.

Rex. *vs.* Chevle, 3 Barn. & Add., 833.

Parol evidence is admissible to show that the consideration in the deed was paid by another than the grantee for the purpose of establishing a resulting trust, although contrary to the express recitals of the deed.

Millard *vs.* Hathaway, 27 Cal., 119.
Dorsey *vs.* Clark, 4 Harr. & J., 551.
Pritchard *vs.* Brown, 4 N. H., 397.
Dudley *vs.* Bosworth, 51 Am. Dec., 690.
Pomeroy's Equity Jurisprudence, 3rd Ed., vol. 3, section 1040.

X.

The community of acquets and gains consists of the residue after all debts have been liquidated and a recovery can not be had of property conveyed in liquidation of charges and debts against it.

The above proposition announces a rule of law almost universal, a rule based on equity; a rule that simply announces that a man must pay his debts before he can hold his property against his creditors.

Defendants in this cause sought to prove and could have proven by uncontradicted testimony that the price paid by defendants for the land in suit paid off and satisfied the $14,500 note outstanding against the property and given by the father of plaintiff. This debt was a community debt made so by the statute of Louisiana, and we contend that a sale of the property to pay that

debt by the survivor in community was an absolutely valid sale and passed the title. The testimony was admissible to show this state of facts and we believe the court erred in not permitting it to go to the jury.

The survivor has the power to settle up the community with or without statutory authority, either in court or out of it.

Haley *vs.* Bank, 26 La. Ann., 230.
Williams *vs.* Fuller, 27 La. Ann., 634.
Cook *vs.* Norman, 50 Cal., 633.
Sanger *vs.* Moody, 60 Texas, 96.

The survivor may convey or mortgage the community property entire for the payment of community debts.

Sadler *vs.* Kimbrough, 24 La Ann., 534.
Johnson *vs.* Savings Union, 63 Cal., 566.

The representative of the succession may sell community property to pay up community debts.

Succession of Myrick, 35 La. Ann., 292.
Davidson *vs.* Davidson, 29 La. Ann., 270.

Community property must satisfy common debts before descending to the heirs.

Wilson *vs.* Helms, 59 Texas, 680.

The survivor of a community may appropriate common property to the payment of community debts.

Johnson *vs.* Harrison, 48 Texas, 257.

The rights of minor children or heirs are residuary.

Curley's Succession, 18 La. Ann., 583.
Sadler *vs.* Kimbrough, 24 La. Ann., 523.

A surviving husband has power exclusive of statute for administration of estates of deceased persons to sell community property to pay community debts.

Gilette *vs.* Warren, 62 Pac. Rep., 975.

The husband has the power to mortgage community property to satisfy a liability arising on account of a bond executed by him as surety for another during his wife's lifetime.

Hinzie *vs.* Robinson, 50 S. W. Rep., 635.

The community in Louisiana for the purpose of liquidation and settlement has a fictitious continuation after its actual dissolution by the death of the wife.

Hook's Succession, 46 La. Ann., 353.
Dumestre's Succession, 42 La. Ann., 411.
Landreaux *vs.* Logue, 43 La. Ann., 234.

And for such purpose, the husband retains the custody and control of the community property.

17 La., 242.
2 La. Ann., 30.
12 La. Ann., 222.
23 La. Ann., 424.
25 La. Ann., 391.

And he may be even sued by the community creditors without the joinder of the heirs or personal representatives of the wife and held for judgment and community property validly sold and good title made against the wife's heirs.

Verier *vs.* Loris, 48 La. Ann., 717.
Hawley *vs.* Crescent City Bank, 26 La. Ann., 230.
Beard *vs.* Memee, 23 La. Ann., 424.
Recker *vs.* Pearson, 26 La. Ann., 391.

An administration of the deceased wife's estate is unnecessary for the purpose of divesting that of the community and vesting a complete title in a purchaser in the property sold.

McLean's Succession, 12 La Ann., 222.
Brown *vs.* Jacobs, 24 La. Ann., 526.

Heirs can not alien the land to the prejudice of the creditors and in fact and in law they have no right to the real estate or their interest, except that of possession, until the creditors are paid.

Watkins *vs.* Wolman, 16 Pet., 25.

One who has succeeded by inheritance to the estate of his mother, occupies the same position with reference to it as she would have done had she lived.

Cross *vs.* Allen, 141 U. S., 528.

When the community is dissolved by the death of one of the spouses, the survivor and the heirs are each seized of one undivided one-half interest in the community property, subject to the rights and privileges of the community creditors.

Succession of Giddens, 48 La. Ann., 356.
Newman *vs.* Cooper, 46 La. Ann., 1485.

As the community property is the primary fund for the payment of community debts, all such debts must be settled before the survivor of the deceased member can take any separate personal interest in the property.

Dixon *vs.* Dixon, 33 La. Ann., 1370.
Jones *vs.* Jones, 15 Texas, 143.
Tompkins *vs.* Tompkins, 12 Cal., 114.

In Louisiana the wife's interest in the community is residuary and she can have no interest in any of the property until the dissolution of the community and the payment of its debts. Her heirs stand actually in her position.

Tourne *vs.* Tourne, 9 La. Ann., 452.
Durham *vs.* Williams, 32 La. Ann., 163.
Succession of Boyer, 36 La. Ann., 506.

Until the community has been settled, the heirs of the

wife can claim nothing out of the acquets and gains where they have not been put in possession by the court.

Phelan *vs.* Ax, 25 La. Ann., 317.
Daniels *vs.* Ivey, 26 La. Ann., 639.

Community property after the death of the wife stands in the husband's name and he is personally liable for the debts. He is charged with the community debts and the heirs occupy the same position as their mother, and they can claim only the portion remaining after the payment of the community demands.

Williams *vs.* Fuller, 27 La. Ann., 634.
Woodley *vs.* Adams, 55 Texas, 526.
Jones *vs.* Jones, 15 Texas, 149.
Webre *vs.* Lorio, 42 La. Ann., 178.

The purchaser of community property sold for the payment of community debts acquires good title whether there be necessity for the sale or not.

Cage *vs.* Tucker's Heirs, 60 S. W., 579.

The sale in this case went unquestioned and undisputed for more than twenty years and it has been held that the existence of community debts and that the sale was made to pay community debts will be presumed in favor of a purchaser claiming title for a long time from the survivor in community.

Von Rosenberg *vs.* Perrault, 51 Pac. Rep., 774.

X.

The public records are the legal guides to intending purchasers of land as to their ownership, and one purchasing from the record owner for value in good faith gets title.

It stands proven by plaintiffs and uncontradicted in this case that defendants purchased a perfect record

title to the lands in controversy for value in good faith without notice of plaintiffs' title or claim and they have held and paid taxes on this title for more than twenty years.

The heirs of the decedent become vested with the title to such decedent's share immediately on his death, but they are bound to await liquidation to recover it.

Tugwell *vs.* Tugwell, 32 La. Ann., 848.
Glasscock *vs.* Clark, 33 La. Ann., 584.
Broad *vs.* Murray, 44 Cal., 228.

Where there are community debts and the surviving husband sells the cummunity lands, the purchaser is not obliged to see, even, that the proceeds are applied to the payment of community debts.

Cruse *vs.* Barkley, 70 S. W., 358.

The purchaser from the surviving husband of land conveyed to him during the marriage upon full consideration and without notice of the fact that the vendor had been married, takes good title against the heirs of the wife.

Hanzley *vs.* Lewis, 82 Texas, 595.

Where a husband holds the legal title to community lands, a purchaser from him after the wife's death takes the land free from the equitable community title of heirs, where he has no notice of such title.

Mangum *vs.* White, 41 S. W. Rep., 80.

Where a husband remained in possession of community real estate for fourteen years and sold same without objection to a bona fide purchaser for value, the law will presume that the sale was lawfully made, and this presumption will prevail to perfect the title of such

purchaser whether there were community debts at the death of the wife or not in a suit by the heirs of the wife.

Crary *vs.* Field, 61 Pac. Rep., 118.

One who holds a secret title, that is, not discoverable from the records, holds the burden of proving notice to a subsequent purchaser of the legal record title. The burden is not on the subsequent purchaser to prove want of notice.

Peterson *vs.* Macauley, 25 S. W., 826.

XI.

Payment of taxes is prima facie evidence of possession, and the payment of all taxes for more than ten years by persons holding and claiming land under just and valid title on its face, entitles such persons to a decision of the jury upon their plea of ten years' prescription.

That defendants are the holders of a legal chain of title from the sovereignty without a break or blemish, is undisputed. That they have paid all taxes and owned this land in this manner for more than twenty years is undisputed. That they have been in possession of the property, if necessary, is admitted in plaintiffs' petition. They were entitled to have the jury pass on the plea of ten years' prescription.

Conclusion.

The rights of the respective parties to this litigation are plain from the record. More than twenty years ago defendants purchased the property in controversy and paid full value for it, obtaining a perfect record title thereto, since which time they have paid all taxes and openly claimed the land. Plaintiffs, who claim that their mother died twenty years ago and who have acquiesced

with this sale and conveyance with full knowledge ever since, come now and against the good faith purchase of defendants urge their claim as heirs of their mother. They introduce in evidence a perfect chain of title to defendants, the deed to their father being during the lifetime of the mother and reciting a consideration of $15,000, only $500 of which by the deed appears to have been paid. They then prove the death of the mother and their heirship and rest.

We believe that, as the case then stood, judgment should have been decreed for defendants. They were shown to be innocent purchasers in good faith of the property, and as such the law should afford them protection in their title. Not only that; the plaintiffs did not undertake to show that the father and mother ever owned any beneficial interest in the property and made no effort to show the payment of the purchase price for the land by the community, or that it had ever been paid. Until it had been paid the community could not own the land, and their evidence showing that it had never been paid, in our judgment, should defeat their right of recovery. Had the deed to the father recited a cash consideration paid during the life of the mother, it might be the presumption arising that the property was community would render further proof unnecessary, but this presumption can not be extended and bring into the community of acquets and gains property which the record shows had never been acquired by it. The presumption can not go this far. At best, plaintiffs upon the proof offered by them, we submit, could recover no more than the pro rata interest presumably in the community as shown by the deed to their father. And in this instance, that interest was $500, or an undivided one-thirtieth of the entire property, or an undivided one-sixtieth recoverable by the heirs.

Defendants undertook to show and should have been permitted to show that even the $500 was never paid by the community; that the sale to plaintiffs' father was a simulation; that it was simply the placing of the property in his name in trust for Knight and Lovett for the purpose of giving him the widest latitude of agency, as described in Griffith *vs.* Alcocke, 37 S. Rep., 47, decided by the Supreme Court of Louisiana in 1904. They offered evidence competent for that purpose, but it was rejected by the court, and we submit in this the court committed reversible error.

Defendants further offered competent testimony to show that even if the property in controversy was the community property of W. J. Knight and his wife, still it was sold by W. J. Knight for the purpose of paying community debts, and not only community debts, but a community debt against the particular land sold, and that the proceeds of the sale actually went in payment of that indebtedness. Why this testimony was rejected by the court, under the authorities cited and under the law as we take it to be, we do not know, but it was certainly admissible for the purpose offered, and in rejecting it we submit the court committed reversible error.

The ten years prescription plead by defendants was ignored by the court as well as all of the other defenses offered. We submit the evidence in the case demanded that the plea of prescription be submitted to the jury.

We submit that on account of the errors pointed out, the judgment of the lower court should be reversed and either here rendered in favor of plaintiffs in error, or remanded for another trial.

Respectfully submitted. **A. P. PUJO.**

HOLLAND & HOLLAND,
Attorneys for Plaintiffs in Error,
Lutcher & Moore Lumber Co. et al.

Supreme Court of United States.

NO. 101. OCTOBER TERM 1909.

DOCKET NO. 21,068.

LUTCHER & MOORE LUMBER CO., ET AL

VS.

WILLIAM H. KNIGHT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF ON BEHALF OF RESPONDENTS PLAINTIFFS IN THE SUIT.

——SYLLABUS——

In the absence of stipulation to the contrary, marriage in Louisiana produces a community of acquets and gains between husband and wife.

All property acquired during the marriage in the name of either spouse is presumed to belong to the community.

On the dissolution of the community by the death of the wife, her undivided half of the community property is inherited by her heirs.

A sale of such property by the surviving husband after the death of the wife, conveys title only to his undivided half of the property, and his vendee becomes co-owner thereof in indivision with the wife's heirs.

While the father has the usufruct of his children's share of the community property, that right of usufruct is terminated by a subsequent marriage.

Prescription *acquirendi causa* does not run against minors, so that a suit entered by the child to recover his mother's share of the property within ten years after his majority is not prescribed.

In such a suit the condition of the community is not a subject of inquiry. While the wife's heirs inherit the community property subject to the community debts, the community cannot be liquidated nor the community debts inquired into in a suit for the property against the purchaser from the father.

While the unconditional heir is liable for his ancestor's debts, such liability can only be enforced in a proper suit against him. His property cannot be taken even for debt without judicial process.

Every transfer of real estate must be in writing, the written act of sale is full proof of the agreement contained in it against the contracting parties and their privies; its terms cannot be varied, altered or destroyed except by a counter letter or other written evidence.

Title to real estate cannot be proved by parol; nor is parol admissable to prove that the apparent vendee was not the actual purchaser but in fact the agent of others.

A judgment authorizing recovery on a written instrument necessarily involves an adjudication of its validity.

A judgment upholding a title is conclusive as to all the property covered by the title, whether involved in the first suit or not, against all parties to such suit and their privies or assigns.

A purchaser is a privy by contract to his vendee, and is bound by all the estoppels which affected his vendor, and is entitled to all advantages enjoyed by his vendor, of whom he is only the successor by particular title, and from whom he could acquire no better title than he himself possessed.

A party cannot controvert the title of one under whom he claims; and if the proceedings or evidence in a suit show that both parties trace their titles to a common source, neither can attack the title of their common author.

The judgment of a court of competent jurisdiction will be respected and be given effect by all other courts.

The law of the state where the land is situated governs in all questions of title thereto, and no contrary law or rule elsewhere has any weight.

STATEMENT

This is a suit instituted by plaintiffs (the respondents here) to recover from defendants (plaintiffs here) an undivided half interest in two thousand and eighty-three acres of land situated in the parish of Vernon, State of Louisiana, in-

herited from their mother, Mary Cain Knight, and improperly sold by their father, W. J. Knight.

W. J. Knight and Mary Cain married in July 1875, and the wife died in 1885, leaving four children, who are the plaintiffs in this case. On July 28th, 1882 D. R. Knight and J. A. Lovett sold to W. J Knight the 2,083 acres of land here involved, together with a large saw mill and appurtenances, wagons, teams, lumber, timber, logs and the stock of merchandise in a store. This land belonged to the community and the title thereto was in the name of the husband, W. J. Knight at the time of the dissolution of the community by the death of the wife.

In 1886 W. J. Knight married a second time and by the said second marriage his right of usufruct of his children's property was terminated under the law of Louisiana. In 1887 W. J. Knight sold an undivided half interest in this land to Viola Knight, wife of D. R. Knight and an undivided one-fourth interest therein to J. C. Knight; in 1889 W. J. Knight, J. C. Knight, and Viola Knight through D. R. Knight, agent, joined in one act, sold the whole of this land to H. J. Lutcher and G. B. Moore, and afterwards Moore sold his interest to the Lutcher & Moore Lumber Company. This suit was instituted in March, 1903, when the oldest child was about twenty-seven years old, and therefore before the ten years' prescription accrued.

The suit was brought by plaintiffs as heirs of their mother, claiming one-half of the land as her community interest therein, on the face of the title and on the law of the State under which property acquired during marriage belongs to the community between husband and wife; that she owned the undivided half of all property in the name of either spouse at the termination of the community by her death, of which her heirs become immediately the owners,

and which the surviving husband and father had no power to sell.

The suit was originally instituted in the State Court in the Parish of Vernon, and removed to the United States Circuit Court of the western district of Louisiana on the petition of the defendants, where, on the first trial plaintiffs suit was dismissed. On appeal to the Circuit Court of Appeals of the Fifth Circuit, that judgment was reversed and the case remanded to be returned to the State Court, on the ground that the petition for removal was insufficient. Instead of returning the case to the State Court, the defendants were allowed to amend their petition for removal and jurisdiction retained by the Circuit Court, all over the objection of plaintiffs who took a bill of exceptions to the action of the Court.

The first answer filed by defendants appearing in the record appears on p. 7, and why counsel calls it "their first amended original answer in lieu of their original answer heretofore filed," the writer doesn't know. But that answer set up the plea of no cause of action, a general denial, a special denial that W. J. Knight married plaintiffs' mother or that they were lawful heirs of any previous marriage, an averrment that plaintiffs claim that they were heirs of W. J. Knight's first wife and the property sued for constitutes part of the community of Knight and his first wife is without foundation in fact and in law. An allegation that the property sued for was the separate property of W. J. Knight, being a gift to him from D. R. Knight and J. A. Lovett; an allegation that neither the community nor Knight paid any consideration for the property; that the cash portion of the price recited in the act was not paid and the note for the credit part of the price was never executed and never had any existence; and that the property was a gift to W.

J. Knight and was his separate property.

In contradiction of all these allegations the answer proceded to allege that the title to the property was never in the name of W. J. Knight except as trustee for D. R. Knight and J. A. Lovett under the agreement that he should hold title as trustee for their benefit, W. J. Knight agreeing that he would convey said land to Knight and Lovett or their assigns whenever they requested him to do so; that said W. J. Knight paid Knight and Lovett nothing for the land, and never executed any note therefor; that afterwards, on April 13th, 1889, at the instance and request of Knight and Lovett, or of D. R. Knight, who had paid Lovett for his interest in the land, in compliance with the terms of his original agreement W. J. Knight conveyed the title to H. J. Lutcher and G. B. Moore; that said sale to Lutcher & Moore was made under the directions of Knight & Lovett or one or both of them, and they received the consideration therefor and therefore the alleged community had no interest in the said property and plaintiffs therefore acquired no interest therein through their mother; that at the time of the sale to Lutcher & Moore W. J. Knight was married to his present wife and there was no record of his previous marriage; that all sales affecting the land were duly recorded and so far as the defendants are concerned were executed in good faith and for valuable consideration, defendant having no knowledge of any previous marriage, or of the death of his alleged wife, and they had a right to rely upon the faith and verity of the public records of the parish.

Then still in contradiction of all previous allegations, the answer proceeded to allege or reiterate that the sale of July 28th. 1882 was never intended by any of the parties thereto to convey the real right or title of the property herein sued

for; that no money belonging to said W. J. Knight or the alleged community was ever paid to the vendors and no note or other obligation was ever received or paid; that the pretended sale was made by Knight & Lovett to screen the property from the pursuit of creditors; that it never became the property of W. J. Knight or the alleged community but always belonged to Knight & Lovett who never became divested of their control until April 1889, when Lutcher & Moore bought the paper title held by W. J. Knight because he was the record holder thereof, but that he, "and his alleged previous wife," and Knight and Lovett knew at the said time that the property still belonged to Knight & Lovett and that the pretended sale of July 20th, 1882 was a similation and fiction; that all the parties to the said sale were closely related and the proceeds of the sale were divided between D. R. Knight and J. A. Lovett, who advised and procured the sale to be made and reaped the benefits of the purchase price, "and that their title has been validly conveyed to these defendants."

The answer then proceeded to call in warranty G. B. Moore, W. J. Knight, John C. Knight, Viola P. Knight and Dan R. Knight.

Plaintiffs filed a demurrer, Record p. 10 & 22, to that portion of this answer "that in any way attacks the sale from Knight & Lovett to W. J. Knight of date July 28th. 1882," and asked that it be stricken from defendants' answer, 1st. because defendants tracing their title back to W. J. Knight are estopped from attacking his title received through the act of July 28th 1882 from Knight & Lovett; second. the reality and validity of said sale has already been adjudged in the suit of McIlhenny & Co. vs. D. R. Knight et als (which was Knight & Lovett), and W. J. Knight, intervenor, No. 60 in the District Court of Louisiana in and for the parish of Vernon, wherein D. R. Knight, J. A Lovett and W. J. Knight

were all parties and said sale of July 1882 was declared by the judgment in the said suit to be a real and not a simulated sale, which judgment is pleaded as *res judicata* as to said sale; third, defendants not claiming to be creditors and not relying on any deed of Knight & Lovett, show no interest nor right to attack said sale as similated or otherwise.

Defendants filed an amended answer, record II, in which it was set up that the act of sale from Knight & Lovett to W. J. Knight included all the property belonging to Knight & Lovett, both movable and immovable, and the agreement was that W. J. Knight should act as agent and manager of the business and property of Knight & Lovett, and receive a salary for his services, agreeing to convert the movable property into money and turn over the proceeds to his principals, and to reconvey the land sued for herein whenever they shall desire him to do so; that in compliance with his agreement he did convert the movable property into money and delivered the proceeds to Knight & Lovett, and during "all of said time" (not specifying what time) recognised Knight & Lovett as owners of all said property, and never at any time repudiated said agreement. That early in 1887 he offered to reconvey the lands to Knight & Lovett, and on Feb. 5th, 1887 he did convey D. R. Knight's half interest in the lands to his wife acting by his authority; that J. A. Lovett did not want his half conveyed to him but wanted to sell it and did sell it to W. J. Knight and J. C. Knight, in pursuance of which sale W. J. Knight on February 7, 1887, conveyed a fourth interest to J. C. Knight and kept title to the other fourth for himself; that the five hundred dollars recited in the sale of July 28th, 1882, to have been paid by W. J. Knight to Knight & Lovett was in fact the money of Knight & Lovett; that the note of $14,500.00 was executed by W. J. Knight

and delivered to Knight & Lovett, "but the same was never paid by W. J. Knight to Knight & Lovett or any one else, and it was never the intention of the parties that it should be paid but the said note was afterwards redelivered to W. J. Knight without his ever having paid any part of it," and therefore the recital in the act of sale was error and untrue in fact, as no part of said purchase price was ever paid and the sale to him only constituted a paper title, so the same never became the property of the community, and plaintiffs are without right or equity to any right, title or interest in said lands.

This answer further pleaded in bar of plaintiff's right to recover the prescription of one, two, four, five and ten years.

A bill of exceptions beginning at the bottom of page 67 of the Record shows that near the close of the trial, and after the rejection of the oral evidence of Dr. J. A. Lovett, defendants offered to file another amended answer, in which they adopted all of the allegations and prayers of the previously filed answers, notwithstanding the numerous contradictions and variances between them, in which for further answer to plaintiffs demand they averred in the alternative that if it be held that the sale from Knight & Lovett to W. J. Knight was a valid sale, that in that event the note of $14,500.00 representing the credit portion of the price "was paid only by the sale of the property mentioned in said act, that is to say, that the said note of fourteen thousand five hundred dollars was a valid claim against the community existing between said W. J. Knight and the mother of said plaintiffs; and the said note was paid by the proceeds of sale of the property herein contested and that the heirs of the said Mrs. Knight cannot contest the title of said property without paying their share of the community debts so paid

out of the proceeds of the sale of said property, and no suit can be maintained by them without paying one half of $14,500.00 so paid by the sale of said property, which amount inured to their benefit in the payment of the community debt for which the said plaintiffs were equally bound with the said W. J. Knight.

Plaintiffs' counsel objected to the filing of this amended answer on the ground that it came too late, changed the issues of the defense, and was in fact a plea of want of tender which should have been filed in *limine litis*, which objections were sustained and the amended answer not allowed to be filed.

Both before and after the tender of this last amended answer defendants offered in evidence the answers of Dr. J. A. Lovett taken under commission to interrogotories propounded to him. As shown on page 60 of the record when first offered this evidence was objected to by plaintiffs' counsel on the grounds, first, "that parol evidence cannot be introduced to change, vary or prove title to real estate; second, that whatever title the defendants claim in this case is derived from W. J. Knight and they are estopped from attacking his title; third, that the defendants are not shown to be creditors of Knight & Lovett and therefore have no interest in contesting their deed to W. J. Knight; fourth, the plea of *res judicata* is binding on defendants; fifth, defendants answer does not charge fraud or error in any manner, shape or form.

To the second offering of Dr. Lovett's evidence, with the oral evidence of two witnesses offered to be placed upon the stand, see Record p. 69, plaintiffs' counsel objected upon the grounds, first, that defendants in their answer had not set up any settlement of the community between W. J. Knight and his deceased wife and should not be allowed to contest the same; second, that defendants have no right to demand

such a settlement or attack same in this collateral manner; third, that the receipted note is the best evidence of its payment; fourth, that the amendment is in the nature of a want of tender, comes too late, and is inconsistent with the original and changes the issue, and should not be allowed after the case has gone to trial. Plaintiffs' objections were sustained and the evidence excluded.

Defendants took a bill of exceptions, Record 70, to the refusal of the judge to charge the jury that the plea of prescription should be sustained, if they found the defendant had held title for more than ten years in good faith, unless the evidence has shown some fact that would prevent the running of the prescription against the plaintiffs.

Defendants took another bill of exceptions, page 71, to the refusal of the judge to charge the jury that in order for the plaintiffs to recover it was necessary for them to show that the community between their father and mother had been liquidated by the payment of its debts, and until they do so they cannot recover any interest in any specific piece of property.

On the trial the jury found a verdict in favor of the plaintiffs, Record p. 57, and judgment was rendered thereon in favor of plaintiffs, recognizing them as owners of the undivided one-half interest in the land involved. The judgment, Record 58, shows that an error in printing the record in Circuit Court of Appeals has been continued in the record in this court by which John A. Lovett, instead of John A. Knight, appears to be named as one of the plaintiffs in whose favor the judgment was rendered.

In their motion for new trial defendants specify as error the refusal of the court to allow them to file in evidence the depositions of Dr. J. A. Lovett to show the truth of the allegations in their answers and to show that the note given for

the credit portion of the price in the sale of July 28th, 1882 was paid by the sale of the land in question, and in refusing to allow them to prove same by T. J Word; in refusing permission to defendants to file their third amended and supplemental answer; in refusing to charge the jury as requested as shown by bills 4 and 5; in failing to charge the jury in regard to any phase of the law of the case, not covered by any bill.

The defendants carried the case to the Circuit Court of Appeals of the Fifth Circuit on writ of error, in which court the errors assigned covered the same grounds a little more profusely stated. After hearing arguments and considering the case the judgment of the Circuit Court was affirmed: and after failure to obtain a rehearing application was made to this Court to have the case brought up on writ of certiorari, and it was so ordered.

In their application for rehearing to the Court of Appeals, as well as for certiorari to this Court, counsel complain with great pathos that the Court of Appeals were of the opinion that all the defenses set up by them were matters of equity not cognizable by a Court of law, but that the Circuit Court was of a different opinion as shown by its sustaining the demurrer and dismissing their bill in chancery.

It seems that the learned counsel for defendants were of the same opinion as the Court of Appeals and filed a bill in chancery stating all the pleas urged here and asking for an injunction against this suit until that bill could be heard

A demurrer to that bill was filed and sustained by the Court and the bill dismissed. Of course defendants had a remedy by appeal from that judgment dismissing their bill, and we cannot see what place it has in the record in this suit, as counsel surely do not expect any errors complained of in that proceeding to be corrected in this.

Through all of defendants' shifting of position, change of issues, and contradictory allegations, their contention raised through all the pleadings and the evidence offered is that the act of sale of July 28th, 1882 is not true, does not present nor contain the true agreement between the parties; that it was never the intention of the parties to make a real sale, but that, to shield their property from the pursuit of their creditors, Knight & Lovett put their property in the name of W. J. Knight, not as owner, but as their agent to sell it and turn the proceeds over to them. This question had been presented to the Courts and settled just after the transaction was made, when all the parties were alive and present and all the facts fresh in their memories. The creditors of Knight & Lovett attached the movable property covered and conveyed by the same title as the land; W. J. Knight intervened in those suits and set up his ownership under this title; and the judgments of the Court in the various attachment suits recognized and maintained W. J. Knight's title and adjudged that the title of July 1882 was real and not simulated. See Record pp. 39 to 57.

All this seems inconsistent with and destructive of the alternative allegation in their amended answer last offered and rejected during the trial that, if their main contention be not correct, then that the note for $14,500.00 was given for the credit portion of the purchase price of community property, was a community debt, was paid after the dissolution of the community in the sale of the property, and plaintiffs must pay half the amount before they can recover their half of the property. Outside of the settled jurisprudence of this state that the settlement of the community and the payment of the community debts is not a condition precedent to the heir's right of recovery, this contention is inconsistent with defendants' repeated allegations, by which they are

bound, that all the movable property covered by the sale of July 1882 had been disposed of by W. J. Knight and the proceeds paid to Knight & Lovett which, if true, must have largely extinguished that note.

Besides, it seems ludicrous for defendants to contend that by paying $2,083.00 for 2083 acres of land, now worth ten or twenty times that amount, they paid a note of $14,500.00. Besides, they do not say they paid the note, or that it was paid through the sale to them, yet they claim that half the amount of the note must be paid to them before plaintiffs can recover their property. They stand in the position of holding plaintiffs', property taken from them without any process of law, and contending that they must get, not half what they paid, but half of a community debt, a note many fold greater than the price they paid, before the property can be recovered by the legal owner. Suppose plaintiffs are liable for half the community debts, legal liability can be enforced only by a proper suit between the party entitled to recover, who must establish his claim according to law, and the person sought to be held liable, whose property can be taken only after judgment and through proper process to execute it.

AUTHORITIES AND ARGUMENT

C. C. 2399. Every marriage contracted in this State, superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary.

C. C. 2402. This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although

the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase.

C. C. 2405. At the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possess, are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage, or which have been given them separately, or which they have respectively inherited.

C. C. 2406. "The effects which compose the partnership or community of gains, are divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage."

After dissolution of community husband can sell only his undivided interest in the property, and vendee becomes coproprietor with wife's succession. 29 A. 663. Bonnett vs. Fuller; 32 A. 852, Tugwell vs. Tugwell; 33 A. 585, Glasscock vs. Clark; 34 A. 1026, Meyers vs. Eaton; 39 A. 786, Heirs of Murphy vs. Jury & Gillis; 2334 C. C.

The wife or her heirs may sue for her share in the community before it has been liquidated. 39 A. 785, Heirs of Murphy vs. Jury & Gillis.

And without alleging that it is solvent. 33 A. 584, Glasscock vs. Clark.

The rights of parties being fixed at the moment of dissolution of the community. 32 A. 848, Tugwell vs. Tugwell; 39 A. 785, Heirs of Murphy vs. Jury & Gillis; 42 A. 411, Succession of Dumestre; 2. R. 378, Hart vs. Foley; 48 A. 677, Verrier vs. Lorrio.

C. C. 3522. Minors and persons under interdiction cannot be prescribed against, except in the cases provided by law.

"Property acquired during a marriage in the name of the husband is presumed to belong to the community. Nor will such presumption be rebutted by proof that he acquired it with the money of his children by a former marriage; nor will such fact affect the title of the community to the property, though it may create a debt against it."

"The heirs of the wife become vested with a title to her share of the community property at the moment of her death; and, though they receive it subject to the payment of the community debts, they are not bound to await a liquidation of the community before resorting to an action to recover it. Tugwell vs. Tugwell, 32 A. 848, and Glasscock vs. Clark, 33 A. 584, reaffirmed. Nor in such action, petitory in its character, is the indebtedness of the community or its financial condition when dissolved a legitimate subject of inquiry." 39 A. 785, Heirs of Ory Murphy vs. Jury & Gillis, J. P. Murphy, warrantor.

"Upon the death of the wife, an undived half interest in the property of the community vests in her heirs, and a subsequent sale by the surviving husband, though purporting to convey the whole property, in reality conveys only the undivided interest of the husband, and constitutes the vendee an owner in indivision with the heirs of the wife, who are not bound to await the liquidation of the community for the bringing of an action to recover their interest. Nor, in such action, is the indebtedness of the community, or its financal condition, when dissolved, a legitimate subject of inquiry."

"2. A minor is not estopped to sue for the recovery of property inherited from her mother, and illegally sold by her father, because of the payment of the price to the administrator of her father's successien, or of the payment of the same by her father's administrator to her grandfather, who has not qualified as her tutor, and is not shown to have

used the money for her benefit, or by reason of the fact that part of such price has been paid to her after her majority, when it does not appear that she was informed of the source whence it came."

"3. The prescription of 10 years, *acquirendi causa*, does not run against minors." 111 La. 760, George et al. vs. Delaney.

On the subject of the heir's right to sue for property the Court cites: Bennet vs. Fuller, 29 La. Ann, 663; Tugwell vs. Tugwell, 32 La. Ann. 848; Glasscock et al vs. Clark, 33 La. Ann. 584; Ogden et al. vs. University, 49 La. Ann, 191; 21 South. 685; 33 La. Ann. 744.

On the subject of prescription in the body of the decision the Court says: "It is also clear that the plea of prescription is not well founded, since the elder of the plaintiffs attained her majority only in 1896, and this action was brought in 1902; and the prescription, *acquirendi causa*, does not run against minors. Civ. Code, Art. 3522; Barrow vs. Wilson, 38 La. Ann. 209; Messick vs. Mayer, 52 La. Ann. 1161, 27 South, 815."

32 A. 848. "When the community of acquets and gains is dissolved by the death of the wife, the respective interests of the surviving husband and of the deceased wife attach, *at the moment of its dissolution*, to the property of the community, subject to the payment of the community debts. This right will be recognized if sued for in the proper action, and may be enforced at any time, when demanded by a partiton of the property or otherwise." * * *

In the body of the decision, after quoting C. C. 2405 and 2406, the Court says: "The construction of this last article, although seemingly so plain in its terms. and the nature of the interest of the surviving wife or her heirs in a community dissolved by her death, and the rights of action growing out

of it, have been the subject of many and conflicting decisions by the Courts of the State, and the jurisprudence on this point is somewhat unsettled.

"In the case of German vs. Gay et al. 9 A. 582, the identical question here presented came up for ajudication. The Court in that case says: 'The plaintiff as heir-at-law of Nancy Frier, late wife of R. Nichols, and in community with him, sues the defendant for one-half of a slave which belonged to the community. The question presented by the exception is whether the heir of the wife has a right to recover the undivided half without alleging that a partition has been made, and *the community settled.*'

"The Court held that the action would lie, and further says:

'It cannot be doubted that the community terminated by the death of one of the parties; if the husband survives, he has no longer a right to sell the whole property. The heirs of the wife may renounce or accept the community; if they accept either tacitly or expressly, they become joint owners with the surviving husband; and if the husband sells he can convey no greater right than he has himself, and his vendee becomes the co-proprietor with the heirs of the wife. * * * According to our understanding of the Code, the distinct interest of the parties attaches at the dissolution of the marriage, subject, however, to the right of the wife or her heirs, as the case may be, to renounce, and thereby exonerate herself from the payment of the debts of the community. * * * The District Judge is of opinion that a distinct interest does not vest in the wife or her heirs before a settlement or liquidation of the community; but if this were so it would be difficult to reconcile that part of the Code which authorizes the heirs of the wife, or herself, if she survives, to attack alienations made by the husband, even dur-

ing marriage, which had been made in fraud of her rights. If her eventual right depended altogether on a settlement to be had of the community, she would be without any right of which she could be defrauded.

The pretentions of the surviving husband rest upon the supposition that he has in law a right to settle and liquidate the community, and that the rights of the wife depend upon such settlement and liquidation, which must be done with him and him alone. His authority as master of the community ceases on the dissolution of the marriage. The right of the heirs of the deceased party then attaches to have a partition of the effects subject to the payment of the debts.

"The opinion in this case, from which we have just quoted, but reasserts the principles enunciated in the case of Broussard vs. Bernard, 7 L. 222, and they have been followed by a long line of decisions which re-affirm the same doctrine. See 12 R. 266; 3 A. 562; 5 A. 581, 582; 16 A. 49; 18A. 409; 19 A. 428.

"In the case of Bennett vs. Fuller, 29 A. 733, the various decisions on this subject were reviewed by our immediate predecessors; and after referring to the conflict in the decisions, and thoroughly discussing the same, they quote from the earlier decisions which we have cited, and expressly sanction and approve the doctrine which they enunciate. We, too, concur in their conclusions.

"To give the article of the Code referred to a different construction or the construction warranted by some of the decisions of this Court, a number of which has been cited by counsel for defendant, would be in a great measure to destroy the force of the article, and almost to deny any right under it whatever to the surviving wife or her heirs; or if any right is recognized, it is so undefined, and its exercise clogged with so many conditions as to render it virtually impracticable.

"To set at rest this vexed question, we distinctly announce that, construing the articles of the Code upon this subject in accordance with what we conceive to be their plain and express language, we hold that when the community of acquets and gains is dissolved by the death of the wife, the respective interests of the surviving husband and of the deceased wife attach at the moment of its dissolution to the property of the community, subject to the payment of the community debts. This right will be recognized when demanded in the proper action, and may be enforced at any time when demanded by a partition of the property or otherwise. * * *.

"The title to one-half of the Community property is vested in the heirs of the deceased wife at the moment of her death, and it is not necessary for them, when they claim it, to allege that the community is liquidated and solvent. Decisions in 25 An. 379, and 26 A. 639, overruled. Decision in 32 An. 848, affirmed." 33 A. 584. Glasscock et al vs. Clark.

In the body of the decision the Court says: "The plaintiffs, as heirs of their mother, sue to be decreed the owners of an undivided interest of certain real estate acquired during the community between her and her husband, and which the latter assumed of his own authority to sell, as a unit, after her death.

"The defendant filed a peremptory exception of no cause of action, which was sustained, and the suit was consequently dismissed.

"We are left to infer, from the brief filed on behalf of the plaintiffs, that the judge of the lower Court considered that the plaintiffs could have no right of action unless upon allegation of the liquidation and solvency of the community, as was announced in 25 An. 379, and 26 An. 639.

"The exception was not well founded, and the judgment

sustaining it is erroneous.

"At the death of plaintiffs' mother, the effects which composed the partnership of gains were divided into two equal portions between them, in their mother's right, and their father in his own; R. C. C. 2406; Domat, v. 2, p. 32, No. 2470; and the rights so acquired vested so effectually in the plaintiffs, that the surviving partner could not legally alienate or encumber the property so as to affect them. 23 An. 638; 15 An. 113.

"The heirs being considered seized of the succession from the moment of its being opened, the right of possession which the deceased would have had, if the community had been dissolved by judgment, vested and continued in the person of the heirs, and each heir became an undivided proprietor of the effects of their mother's succession, for the part or portion coming to him, which formed among them a community of property, as long as it remained undivided; R. C. C. 936, 1214; so much so, that a judicial mortgage can be acquired by registry, against an heir, affecting all the mortgageable property thus acquired and owned by him. 21 An. 253; 27 An. 504; 31 An. 748; Brennan vs. Bernard; 7L. 222; see, also, 7 N. S. 94; 9 L. 284; 12 R. 266; 1 R. 149, 378; 10 R. 18; 3 An. 562.

"This doctrine was fully sustained in Bennett vs. Fuller, 29 An. 663, in which it was held, that, after the dissolution of the community, the husband, as its former head, has no power to sell and can convey title to no greater part of the community property than his undivided half interest in it. See 31 An. 498.

"In Tugwell vs. Tugwell, decided by the present court, 32 An. 859, we distinctly held that the interest of the deceased spouse attaches at the moment of the dissolution of the community to the property of the same, subject to the

payment of the community debts, and that for the enforcement of the rights so acquired by the heirs it is not necessary that they should have been recognized or the community liquidated previously.

"By instituting the suit, in the right of their mother, the plaintiffs have accepted her succession and, consequently, the community which existed between her and their father.

"In the Tugwell case, the principle announced in Gennan vs. Gay, 9 L. 582, which is decisive of the question here presented, was distinctly affirmed, the Court making a copious extract from the opinion delivered at the time.

"See, also, 5 An. 581, 582; 6 A. 295; 16 A. 49; 18 A. 409; 19 An. 428; 7 R. 183; 5 R. 9; 2 L. 300; 12 R. 258.

"We also there held, that an heir can sue for his share in a succession without being constrained to make his co-heirs parties. 5 L. 430; 4 O. S. 472; 3 L. 134, 32 An. 949.

"The rulings on the points now before us, as found in 25 A. 379; 26 A. 639; 27 A. 634, may well now be treated as no longer authority."

On the application for rehearing the Court said: "The oral argument of his counsel, which had been listened to with earnest attention and interest, had not escaped our recollection, but fell short of the intended effect, which was to induce us to review two decisions which had been considered as erroneous by our immediate predecessors (in 29 An. 663,) whose conclusions had been reaffirmed by ourselves in Tugwell vs. Tugwell, 32 A. 849; and which decisions we then considered, and now declare, to be formally and finally overruled. We refer to the cases of Phelan vs. Ax, 25 An. 379, and Daniel vs. Ivy, 26 An. 639."

"A deed which purports to convey a greater estate than the grantor has will be void only as to the excess, and will be construed as a conveyance of that which it was in his power

to convey. And where the interest of a tennant in common in land is conveyed by a deed which purports to convey the entire interest therein, and a subsequent conveyance by metes and bounds of portions of such tract is made by the grantee to others by deeds purporting to convey the entire interest, it is decided that the latter will take proportionate shares of the individual interest of the original tenant in common." 13 Cyc. p. 657 & 8 (1)

After the dissolution of the community by the death of the wife, the husband, as its former head, has no power to convey title to any greater part of community property than his undivided part thereof, and his vendee becomes simply a co-proprietor with the heirs or succession of the wife. 34 A. 1026, Meyers vs. Brigham, affirming Bennett vs. Fuller, 29 An. 663; affirming Tugwell vs. Tugwell, 32 An. 848; affirming Glasscock vs. Clarke 33 An. 584. All these cases are cited with approval in Landreaux vs. Lonque, 43 A. 239, and George vs. Delaney, 111 La. 760.

"Property acquired during a marriage in the name of the husband is presumed to belong to the community. Nor will such a presumption be rebutted by proof that he acquired the property with the money of his children by a former marriage; nor will such fact affect the title of the community to the property, though it may create a debt against it.

"The heirs of the wife become vested with a title to her share of the community property at the moment of her death; and though they receive it subject to the payment of the community debts, they are not bound to await a liquidation of the community before resorting to an action to recover it. Tugwell vs. Tugwell, 32 A. 848, and Glasscock vs. Clark, 33 A. 584, reaffirmed. Nor in such action, petitory in its character, is the indebtedness of the community or its financial

condition when dissolved, a legitimate subject of enquiry." 39 A. 785, Heirs of Murphy vs. Jurey & Gillis, J. P. Murphy, warrantor.

This was a suit to recover plaintiffs' interest in certain property as heirs of their deceased mother by reason of her community interest.

The property had been treated as the husband's separate property, because, although acquired during the marriage, it had been paid for with money belonging to the husband and his children by a preceding marriage. After the second wife's death he remained in possession of the property until he died, there having been no settlement of the community and no administration of his wife's succession. After the husband's death there was a partition of his estate and this piece of property fell to a son by the first marriage, who sold it to the defendants and was called in warranty. The Court proceeds to say:

"It is shown that these lands were all acquired during the existence of the community between J. J. Murphy and his wife, Ory Murphy, and are therefore presumed to be community property. C. C. 2405.

"Upon the dissolution of the community by the death of the wife, the title to her share of the community property, the one undivided half of the same, vested in her heirs. C. C. 3406; Tugwell vs. Tugwell, 32 A. 848.

"And though the heirs received the property subject to the community debts, it is now settled that their action for it may be maintained without allegation or proof of the liquidation or solvency of the community. 1b. and Glasscock vs. Clark. 33 A. 584. And it is enough to say in this case, as in the case cited above, that the creditors of the community, if there are any, are not before us seeking to enforce their claims against the community. Nor would any such inquiry

be permissible in an action of this kind, which is petitory in its character, and the right of the plaintiffs acquired at the instant of the death of the person from whom they inherited. The communitv creditors, if there were any, might have subjected this property by proper proceedings to the payment of their debts and thus divested the plaintiffs of their title to the property, but it has not been done and cannot be done in this form of action, nor by the parties to the present controversy. All evidence respecting claims against, the community and its condition at the moment of its dissolution should therefore have been rejected.

"There is a plea of prescription of ten and thirty years urged against the plaintiffs' right of action which, was over ruled by the lower court and properly so.

"Ten years had not expired between the date of the conveyance of the property from J. P. Murphv to the defendants. J. P. Murphy claimed tne property by inheritance from his father, J. J. Murphy, and as the father had not the vestige of title to the property, he transmitted none to his heirs. They took it *cum vitiis*. There was no basis for the prescriptiom urged in favor of J. P. Murphy.

"There is an amendment of the judgment of the lower court prayed for as to that part of it which rejects plaintiffs' claims to certain designated portions of land.

"The amendment must be allowed:

"The defendants in their answer admit the possession of all the land claimed and described in the petition.

"J. J. Murphy was in possession of it at the dissolution of the community, it was a matter of no moment whether a part of this land was acquired by a military warrant or bv money, so that it was acquired during the marriage. This and other portions excepted or declared free from plaintiffs' claims, purports to have been acquired by J. P. Murphy by

inheritance from J. J. Murphy and partition. They, defendants, claim solely through their purchase from J. P. Murphy. J. J. Murphy was the author of both warrantor's and defendants' titles, and nothing is better settled than that parties cannot dispute their author's title."

It is clear that under the law and jurisprudence of this state the property sued for legally and rightfully belongs to plaintiffs, that prescription did not run against them while minors; and that they instituted their suit less than ten years after their majority, so that defendant's plea of prescription is not good, and the learned Circuit Jugde was correct in refusing the requested charge regarding ten years' prescription, as the evidence clearly shows "some fact that would prevent the running of prescription against the plaintiffs," quoting from the requested charge (Record 70). Children born of a marriage contracted in July 1875, against whom prescription could not run during minority, could not have been prescribed against in March 1903 when this suit was brought, and when the oldest child was not over 27 years old.

It is also apparent from the foregoing citations of authority that plaintiffs have a right to prosecute this suit without showing a liquidation of the community and the payment of its debts. The law is not so unjust as to require infants to look after the settlement of estates and the payment of debts. It is sufficient for them to show their property held by another, and the defendant cannot legally hold it unless he shows that the heirs' title has been divested and transferred to him by due process of law. A man's property, much less a child's, cannot be sold and held without legal process, merely because he is in debt. If there are any community debts for which plaintiffs are liable in part there is an orderly manner provided by law for the enforcement of their liability—

and not by taking their property witnout a hearing. If the community should be settled and liquidated, it should be gone about in an orderly manner. Defendants are not charged with the duty nor clothed with the power of looking after the liquidation of the community, nor to the payment of their debts by plaintiffs, who have made themselves liable for their mother's half of any community debts that may exist. Defendants have disclosed no legitimate interest in these questions, and no such objects can be accomplished in this form of action. Indeed, defendants did not profess to know, and made no effort to show, the true condition of the community, and it could not be done in this suit, even if they knew all about it. Therefore the Court did not err in refusing the charge requested, to the effect that plaintiffs could not prosecute the suit without first showing the liquidation of the community and payment of its debts (Record 71).

Defendants claim or assume to have acted in good faith, yet, while good faith is always presumed, we have serious doubts of the quality and quantity of their good faith. It seems probable that they bought the land without investigating the title; that the price they paid was so insignificant and the timber so fine that they just chanced the title—possibly knew the defects and risked it anyway. Of course, if a party or his counsel persist in ignoring the law of the State that governs, and get into trouble by that alone, we cannot see how he has really acted in good faith or why he should be entitled to sympathy or be so loud in his cries for equity. If a party makes an important purchase without having the title examined, he is guilty of such laches as to deprive him of all equitable consideration—particularly when he buys such valuable property for so little. It amounts to no examination, if, ignorant of the law, he makes the examination himself, or if he employs counsel not familiar with the law

where the property is situated.

No Louisiana lawyer would approve a title without inquiry into the marital status of the seller, as well as of previous owners; and as defendants bought from three persons familliar with the facts, they must have learned them also, or were guilty of gross laches in not making inquiry, or in not employing a lawyer to examine the title who would have known or would have ascertained the facts before approving the title.

So, defendants' troubles in this case in no manner justify their loud cries for equity and for the privilege of disregarding the law of the State. The general course of the defense would indicate that it was shaped by counsel who had thought it unnecessary to follow the law of this State, although it is elementary that titles to real estate, as well as proof thereof, and evidence relative thereto, are governed by the law of the State in which it is situated. We find no great difference in the main principles of law here involved between the laws of this and other States or in the jurisprudence of this and the State courts; but so far we have seen no authority cited by defendants except such as we can and will hearinafter show has no application, because based upon some local statute or some rule contrary to the law of Louisiana.

In 141 U. S. 87, Carpenter vs. Strange, this court held that the New York Courts "had no power to decree that a deed of land in Tennessee was null and void." In other words, titles to real estate are governed exclusively by the laws of the State in which it is situated. On p. 106 this Court said: "To declare the deed to Mrs. Strange null and void, in virtue alone of the decree in New York, would be to attribute to that decree the force and effect of a judgment *in rem* by a court having no jurisdiction over the *res* * *

Direct action upon the real estate was certainly not within the power of the Court, and as it did not order Mrs. Strange to take any action with reference to it, and she took none, the Courts of Tennessee were not obliged to surrender jurisdiction to the courts of New York over real estate in Tennessee, exclusively subject to its laws and the jurisdiction of its Courts"—citing several authorities.

Louisiana Civil Code, and not the general commercial law, governs the contract of sale made and executed there, Buckley vs. Hanold, 19 How. 393.

The title to land can be acquired and lost only in the manner prescribed by the law of the place where the land is situated. U. S. vs. Crosby, 7 Cr. 146; Clark vs. Graham, 6 Wheat. 579; Kerr vs. Moon, 9 Wheat. 570; McCormick vs. Sullivan, 10Wheat. 201.

Remedies in respect to real property are according to *lex loci rei sitae*. Robinson vs. Campbell, 3 Wheat. 219.

Real estate is governed by the law of its *situs*. Carpenter vs. Strange, 145 U. S. 105.

"The law of the place in which the land is situated governs the transfer of the land." 13 Cyc. p. 526 B.

"The law of the State where the land is situated governs the construction of a deed." 13 Cyc. p. 600, A. 1.

The foregoing appears ample to justify us in asking this Court to follow the law of Louisiana in this case wherever there is any difference between its laws and rules regarding titles to real estate and proof relative thereto and such laws and rules prevailing in other jurisdictions.

The learned counsel who prepared the supplemental brief on the application for certiorari, only because, as he says, he thought it proper to correct an error in the position assumed by the leading counsel in the case relative to title to community property in Louisiana, thus acknowledging

the controlling force of the laws of this State, appears to have been also unable to find any Louisiana law to sustain his contention. Ignoring the provisions of our Code making written contracts, and particularly sales of real estate, conclusive between parties and privies, also those provisions requiring sales of real estate to be in writing, and numerous decisions constituting the settled jurisprudence of this State that parol evidence is not admissible to prove, alter, or vary titles to real estate, to prove agency to buy real estate, to prove that the apparent vendee was not the real vendee but an agent or trustee, he cites only one authority, a decision of this honorable court in Smithsonian Institution vs. Meech, 169 U. S. 398, rendered under a local statute prevailing in the District of Columbia, but having no force in Louisiana.

In that case this Court held, as shown by the first paragraph of the sylabus: "In the District of Columbia it is the rule that when, upon a purchase of real estate, the conveyance of the legal title is to one person while the consideration is paid by another, an implied or resulting trust arises, which may be shown by parol proof; and the grantee in the conveyance will be held, on such evidence, as trustee for the party from whom the consideration proceeds, whose rights will be enforced as against those claiming under the record title."

It is true that the Court cites other authority to the same effect. But the law of Louisiana is very different. In Louisiana the furnishing of money to make payments on the price, either in whole or in part, does not create a trust or give title to the person furnishing the money. In Westmore vs. Harz, 111 La. 305, the heirs of the deceased husband sued the surviving wife and sought to be recognized as owners of the property, on the ground that the property had been bought and paid for by their father, although the title had

been put in his wife's name. To make this case still stronger than that cited from 169 U. S., this suit involved one piece of property bought before marriage, and while the vendee was the mistress of the plaintiffs father. No such conditions as are stated in 169 U. S. could arise in Louisiana, because property acquired in the name of either spouse, or in those of both, would belong to the community. But the Court held that the property acquired in the name of the vendee before marriage belonged to her and not to her subsequent husband who furnished the money. There were two suits brought by the heirs of the father, one regarding the property bought after marriage in the name of the wife, which, of course, was held to be community property. Regarding the other case the Court said:

"Where the only parties to an act of sale of real property are the vendor and the vendee, the ownership of the property passed to the vendee. The children of a third person cannot by means of parol evidence have the property taken from the vendee and vested in their father on the ground that the act evidenced a disguised donation by him to the vendee, as he had furnished her the money with which the propeaty was bought. The donation to her of the money might be subject to attack, but the ownership in the property would stand."

The Court proceeds: "Plaintiffs claim this property on the ground that the property was bought with the funds of the father, that he continued from the date of the purchase in its occupation and control, that the purchase was in fraud of their rights, and that she was the concubine of their father.

"The testimony shows that these parties lived in concubinange, and we think it also proves that the price was paid by Westmore.

" * * * We do not think that plaintiffs are entitled to a judgment decreeing the property conveyed in the act before DeArmas, notary, to Louisa Harz, to have belonged to their father. The only parties to that act were Devereaux, the vendor, and Louisa Harz, the vendee. Westmore nowhere appears in it. The contract which was created by that act was unquestionably a real one. Devereaux intended to sell, and Miss Harz to buy the property. She was of full age, and under no legal incapacity. It is claimed that at the moment the act of sale was executed she was Westmore's mistress, but the precise date at which her relations with him as such commenced is not known. Assuming that she was his mistress at the time, he certainly did not donate the property in question to her, for it was not his to donate to her. The property belonged to Devereaux, and was transferred directly from him to Miss Harz. Scudder vs. Howe, 44 La. An. 1103, 11 South. 824. If he donated anything to her it was not the property, but the $2,878, the money with which she made the cash payment. Todd vs. Larkin, 38 La. An. 674; Wolverton vs. Stevenson, 52 La. An. 1153, 27 South. 674. The title itself passed to her when she made that payment, and when she executed simultaneously, as she did, her own notes for the balance of the price, secured by mortgage on the property. *The title cannot be made to vest in Westmore by parol evidence.* Breaux's Digest, p. 369, No. 2; Hoffman vs. Ackerman, 35 South. 482. *The litle to the property would not be affected by who would and who would not pay the after maturing notes.* (Italics ours.)

"The only issue we have presently to decide is whether this particular property became by its purchase the property of Louisa Harz.

"We are of the opinion, and so decide, that the owner-

ship of that property vested by the purchase in Louisa Harz, and that, if the plaintiffs had or have any cause of action or right of attack against her by reason of donations made to her by their father, it is by reason of donations of money which he may have made to her. This cause of action and right of attack, if any they have, is expressly reserved to them, as is expressly reserved to defendants all rights of defense which they may have in the premises."

The above is sufficient to show that in Louisiana the purchase of property in the name of one person and the payment of the price by another creates no trust and gives the one who furnishes the money no title to the property, either in law or in equity. A debt may be due him or his heirs, but neither he nor they have any title.

The number of changes of positions and issues presented by defendants in this case is extraordinary; and, while amendments to pleadings are favored, no amendment will be allowed which changes the issues. C. P. Art. 419,420. Amendments sre not allowed pending trial changing issues and delaying suit. 30 A. 531; 1 R. 62; 20 A. 53; 4 R. 466; 2 A. 453; 10 A 542; 15 L. 196; 1 A. 372. Nor at any time when amendment changes issues. 30 A. 1099; 7 R. 274; 10 A. 178. Nor where facts sought to be alleged were known and could have been alleged in former answer. 2 A. 905. Leave of Court or consent necessary. 45 A. 333; 2 La. 220, 210; 1 R. 553; 6 A. 254. Even after being filed an amendment can be ruled out by the Court *ex proprio motu* 15 A. 694. The allowance of amendments is a matter of discretion with the Court. 1 L. 212; 9. R. 79: 27 A. 715. Discretion in allowing an amendment not lightly disturbed. 4 L. 298; 1 A. 275.

As the amended answer which the Court did not allow to be filed materially changed the issues from those presented

by the answers previously filed, as the pretended facts set up therein were as well known to the defendants through the evidence of Dr. Lovett taken orally and under commission months before, and as it contained matter amounting to a plea of want of tender, which can alone be filed *in limine litis*, the Court did not err in not allowing it to be filed.

The changes in defendants' pleadings also involved allegations contradictory to those previovsly made by them, in disregard of the well known principle that parties are conconcluded by their judicial declarations and cannot be heard to prove anything contrary to what they have solemnly alleged. Besides, the last amended answer offered was properly refused, because it sought to open questions which could not be heard and determined in this proceeding, according to the settled jurisprudence of this State for a century past, only excepting the few decisions which were overruled incidentally in many cases, and directly in the 39 A. case cited, that the liquidation or settlement of the community, the payment of its debts, and the liability of the wife or the heirs are not legitimate subjects of inquiry in petitory actions instituted to recover their share of property illegally sold by the husband. Besides, it is manifest that the fictitious allegations set up in that amended answer were mere pretexts under which defendants sought to introduce illegal evidence previously excluded and inadmissible even under the amended answer offered.

In fact and in law, the Court could not legally allow the filing of a pleading nor the introduction of illegal evidence to sustain it which necessarily and indubitably covered the object and intention to introduce evidence parties are estopped from introducing, or which might be illegal from any one.

The whole defense set up by defendants in their several answers, those filed and the one rejected, and all the evi-

dence they offered which was rejected, was intended to make proof prohibited by law. Defendants are estopped from proving or alleging any and every fact set up by them, not only by by the judgments appearing on Record pp. 45 & 46, 56 & 57, plead as *res judicata*, but also by the act of sale from Knight & Lovett to W. J. Knight. Somewhere in this record defendants' counsel have said they were not bound by those judgments and had nothing to do with them, and doubtless their position is the same with reference to the sale of July 28, 1882. All the interest which defendants have or possibly can have in the lands involved in this case was acquired under the title of July 28th, 1882. No man can be heard to question his author's title, as said in some of the authorities above cited; so that defendants have no right, either by pleading or by evidence, to dispute the title of W. J. Knight, because he is unquestionably their author. But, grant for the sake of argument that defendants are right and that they acquired their title really from Knight & Lovett, that does not alter the situation, defendants are equally bound, concluded, and estopped, because they as well as W. J. Knight were parties to the suits in which the judgments were rendered, and also to the act of sale whose validity was thereby upheld. No man can acquire a title without some author, and no man can acquire any better title than his author had. Privies are as much bound as the parties by the estoppels worked both by the judgments and the act of sale, because they are merely the successors of those parties, and a successor, whether by universal title such as inheritance, or by particular title such as a purchase, cannot acquire any better title than his author had, whose title was transmitted to him encumbered with all of its estoppels and disadvantages, as well as clothed with all its rights and advantages.

In their "Supplemental Brief in Behalf of Petitioners," on p. 4, the learned counsel for defendants say: "While we recognize the doctrine that parol evidence is not admissible for the purpose of establishing title to real estate, yet testimony of such character is admissible to show that the note representing the credit portion of the purchase price had not been canceled nor retired at the time of the death of Mrs. Knight."

This would do very well if counsel would stand by their admission that they cannot prove title to real estate by parol; and if they would institute a proper proceeding, we would have no objection to their establishing by legal evidence the true condition of the community as well as to prove that the $14,500-00 note was outstanding at the time of the death of Mrs. Knight. But, as held by numerous authorities hereinbefore cited, such proof cannot be adduced in this proceeding. If any one with a claim against the community will institute suit against the plaintiffs as heirs of their mother, they will respond, and be perfectly willing to meet any liability they have incurred by accepting her succession. But they do protest that their property cannot be withheld from them in order to coerce them to comply with exhorbitant demands, or be deprived of their property.

The following paragraph on the same page of their brief directly contradicts their admission and discloses that their object was to establish title to real estate by parol evidence, and that too by the evidence of a party to the act, bound by its recitals and estopped by two judgments upholding its validity.

The second clause on page 4 of that brief reads: "The main contention of the petitioners in this case (meaning the defendants in the suit) is that the property never belonged to W. J. Knight, but that he was merely a trustee for the

use and benefit of Knight & Lovett, who had transferred the property to him in order to avoid the pursuit of their creditors," In other words, in direct violation of the admission made above, in the second paragraph they disclose their object to be to establish title to real estate by parol, by showing that the real title remained in Knight & Lovett.

This sustains what we have already said, that, throughout all their shifting and changing, their one object is to contradict the recitals of their own act, their own as successors to the original parties, and to establish title to real estate by parol. The proceedings in two suits instituted by the creditors of Knight & Lovett filed in evidence in this suit show that soon after the sale of July 188? those creditors, acting on the theory that that sale was a fraudulent simulation, defendants' contention here, attached the movable property covered by that title: that W. J. Knight intervened, claiming to be owner under the title, and, if Dr. Lovett wanted to assert his ownership and show that the act was a simulation, then, or never, was the time to do it. The proceeding taken by the creditors was proper and legal, in which oral evidence was admissible, in which the widest latitude is permitted in adducing evidence; and in those suits, instituted just after the transaction, with all the parties present and the facts fresh in their memories, the court decided in both cases that W. J. Knight's title was good and that the sale was actual and not fictitious. That settled and concluded forever the validity of that sale as to everything it covered as against the parties and their successors or privies. We therefore cannot see how the able counsel representing the defendants can now seek to unsettle what was then finally determined. But, even without the judgments, they are concluded by the terms of the act of sale itself, because they are the successors and privies of the parties, derive all their

rights from them, and are only sued as such. Not only are they bound by the judgments plead as *res judicata* and by the act of sale, but neither they nor any otner person have any right to prove what they attempt to prove by parol. They claim the right to prove by Dr. Lovett the averments of their several answers, in one that the act was a gift and vested the lands in W. J. Knight as separate and not community property; in another that it was a simulation, no price being paid and no note executed; in another it constituted W. J. Knight the agent of Knight & Lovett, the cash payment having been made with their money and the note, although executed, immediately returned to him; in another that the note was a community debt outstanding at the dissolution of the community and afterwards paid by the sale of the land, though it is alleged numbers of times that W. J. Knight turned over to Knight and Lovett all the proceeds of the movables—necessarily in extinguishment of the note. All these questions are cognate, so that all the authorities on the various subjects, or branches of the subject, can be considered together. Infact, they are mixed to a considerable extent in numerous decisions.

It is apparent that each set of allegations is contradictory of the others and that, under the authorities herein cited none of them are legally susceptible of proof by parol in this suit.

Every transfer of real estate must be in writing. C. C. 2275.

Parol evidence is inadmissible to prove that the person whose name appears in the deed was only the agent and not the purchaser. 45 A. 580; 42 A. 449.

The authentic act is full proof of the agreement contained in it against the contracting parties. C. C. 2226; 45 A. 326.

A sale has full effect between the parties unless a coun-

ter letter is reserved. 47 A. 272; 42 A. 738.

Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before or at the time of making them or since. C C. 2276; 51 A. 636; 109 La. 680; 107 La. 549; 49 A. 984; 45 A. 526; 42 A. 735; 40 A. 157; 27 A. 198; 26 A. 445; 23 A. 589; 12 A. 54; 4 A, 229.

Parol evidence is never admissible to prove title to real estate. 110 La. 1070 (on rehearing).

A party cannot controvert the title of one under whom he claims. 110 La. 306; 15 A. 684; 4 A. 249; 4 N. S. 402; 1 N. S. 577.

If the pleadings or evidence show that the parties trace their title to the same source, neither can attack the title of their common author. 10 A. 327; 5 A. 677; 8 La. 239; 2 La. 215; 1 R. 369.

None but forced heirs or creditors can attack a sale for fraud or simulation. 37 A. 178.

Where defendant, by written answer, admits that he holds title under plaintiff, he is precluded from disputing the plaintiffs' title. 10 A. 542.

Where a party has expressly recognized the title of another, by buying from him, he estops himself from questioning the validity of such title, and a party holding under him, as vendee, must be held to a recognition of that title. 15 A. 684; 34 A. 632.

A party cannot vary or destroy his voluntary written agreements with other than written evidence. 5 A. 315; 11 A. 113; 12 A. 1239; 17 A. 2; 22 A, 382; 35 A. 505; 40 A. 336.

The only exception to this rule is that either party may propound interrogatories to the other, whose written answers are admissible, but they are conclusive, and cannot be contradicted or questioned by the other party. 35 A. 1052;

26 A. 252, 693; 10 A, 705, 706.

"In a suit brought against the widow and heirs of a deceased person for the recovery of real property, standing in his name at his death, on the theory that the deceased was agent of the plaintiff to buy real estate, it is held that parol is inadmissible even to prove fraud in taking the property in his name for the purpose of establishing title in the plaintiff." 42 A. 618; 5 A. 132; 12 A. 213; 15 A. 540; 40 A. 157; 49 A. 984; 116 La. 952, Barrow vs. Grant.

A sale by authentic act has full effect between the parties unless a counter letter is reserved. 47 A. 272.

As the contract of sale must be in writing; necessarily the authority or power to execute that contract must also be in writing. 16 A. 160; 34 A. 231.

Parol evidence is inadmissible to prove that the person whose name appears in the deed was only an agent and not the purchaser. 5 A. 132; 12 A. 213; 15 A 539; 32 A. 635; 45 A. 580; 42 A. 618, 449.

See Hoffman vs. Ackerman. 110 La. 1070 (on rehearing).

In 42 A. 738, this Court said: "It is Hornbook law in our jurisprudence that the validity and reality of authentic acts of sale can be assailed by the parties only in two ways, viz: First, by means of a counter letter; second, by the answers of the other party to interrogatories on facts and articles. Citing 11 A. 418; 9 R. 376; 12 R. 215; 10 A. 704; 27 A. 266; 36 A. 100; 38 A. 54; 6 N. S. 206; 4 La. 1, 169, 351; 3 R. 441; 6 R. 443; 8 R. 102; 11 R. 270; 3 A. 153; 4 A. 487.

A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties and their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the

same parties, or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. 168 U. S. 1; S. P. R. R. Co vs. U. S.

The decisions in 146 U. S 570 and 615 were held to be *res judicata* of the question presented in 168 U. S. 1, because the lands sought in the last case, although different lands, were in the same category as those involved in the 146 U. S. cases. Here the plea is still stronger because the lands here involved were conveyed by the same act as the movables involved in the suits of McIlhenny & Co. vs. D. R. Knight et al, W. J. Knight, Intervenor, No. 60, and E. S. Jemison vs. D. R. Knight et al, W. J. Knight, Intervenor, No. 58. both in District Court of Vernon parish, in both of which the sale of July 28th, 1882, was held to be a real sale, and not a simulation See judgments on pp. 45 and 46, 56 and 57 of the printed Record herein.

In 167 U. S. 371, New Orleans vs. Citizens Bank, on p. 396, this Court said: "The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even though there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule stated in the text books and enforced by many decisions of this court. A brief review of some of the leading cases will make this perfectly clear.

"Bank vs. Beverly, 1 How. 134, 139, it was held that the construction of a will affecting the rights of parties must govern in subsequent controversies between the same parties, without reference to the different nature of the demands. In Tioga Railroad vs. Bloss-burg & Corning Railroad, 20 Wall. 137, and Mason Lumber Co. vs. Buchtel, 101 U. S. 638, it

was held that when the proper construction of a contract was in controversy, the construction adjudged by the Court would bind the parties in all future disputes."

The estoppel here claimed is fully sustained by the decision quoted next from Cromwell vs. Sac County, 94 U. S. 351, 356, restricting the estoppel "to the point or question actually litigated and determined in the original action."

The defense here is that the sale of July 28th 1882 from Knight & Lovett to W. J. Knight was not valid, actual and real; and exactly that question was determined in the former suits of McIlhenny & Co. and Jemison vs. Knight et al. in each of which the judgment neld the sale to be actual, real and valid.

These judgments set up as *res judicata*, must be given the same force and effect in every Court as they have in the Louisiana Courts. 97 U. S. 336; 174 U. S. 714; 176 U. S. 744.

Where, in an action in New York, the matter litigated was whether the plaintiff had accepted or rejected a provision in the will, and resulted in a decree in her favor for certain moneys due by the testator to her, a decree in a subsequent suit, between the same parties in another State, which denies the binding force of the New York decree, is unconstitutional and void. 141 U. S. 87, Carpenter vs. Strange.

"Estoppels are mutual. 4 Com. D. Estoppel, B. They run with the land, into whose hands so ever the land comes; by which the parties and all claiming under them as well as Courts, are bound; were it otherwise, litigation would be endless. Such is the established rule." Accordingly judgment respecting title held binding and not open to subsequent attack. Porterfield vs. Clark. 2 How. 109.

An estoppel arising out of a judgment is conclusive upon all the parties and their privies and may not be invoked or repudiated at the pleasure of one of the parties. Railroad

Co. vs. National Bank, 102 U. S. 22.

All privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive on him with whom they are in privity. Litchfield vs. Goodnow, 123 U. S. 551.

Facts established by matter of record, whether admitted or approved, can never be contested between the same parties or their privies. Gould vs R. R. 91 U. S. 534.

Judgment is conclusive in subsequent suit, between the same parties or their privies. Gould vs. R. R. 91 U. S. 584.

Judgment is conclusive in subsequent suit, between the same parties or privies as to matters actually determined or necessarily involved. Pearce vs. Rice, 142 U. S. 36.

Privies are: "All who have mutual or successive relationship to the same rights; * * *; persons whose interest in an estate is derived from the contract or conveyance of others; * * *; those who have mutual or successive relationship to the same right of property or subject matter; those whose relationship to the same right of property is mutual or successive." 32 Cyc. 388, and references.

In 123 U. S. 551, Litchfield vs. Goodnow, this Court quotes from Greenleaf on Evidence, Vol, 1, par. 523: "* * * But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties and claim under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term *privity* denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in the same relation to the litigating party are bound by the proceedings to which he was a party is, that they are identified with him in interest; and whenever this identity is found to exist, all are alike concluded. Hence, all privies, whether in estate

in blood, or in law, are estopped from litigating that which is conclusive on him with whom they are in privity. The correctness of this statement has been often affirmed by this Court. Lovejoy vs. Murray, 3 Wall. 1, 19; Robbins vs. Chicago City, 4 Wall. 657, 673; and the principle has been recognized in many cases. Indeed it is elementary. Hale vs. Finch, 104 U. S. 261, 265; Railroad Co. vs. National Bank, 102 U. S. 14, 22; Butterfield vs. Smith, 101 U. S, 570."

Plaintiffs here (Defendants in the suit) having acquired title from W. J. Knight and his assigns are privies to him, and bound by the two judgments relied upon as *res judicata*, in each of which his title was upheld. They must have acquired title from somebody, and whether from W. J. Knight or from D. R. Knight and J. A. Lovett, they are equally concluded by the judgments relied on, because all three of them were parties to the suits and bound by the judgments therein upholding the title of W. J. Knight under the act of sale of July 28th, 1882, during the marriage between the father and mother of Respondents; and as the land was not sold before the death of the wife it necessarily belonged to the community at the date of her death, and an undivided half interest therein was inherited from her by her children, these respondents.

"A decree in equity is conclusive of all defenses available to defendant, whether or not they were presented and litigated. But a judgment at law will not conclude defenses which were of a purely equitable character and therefore not cognizable in an action at law, except in those states where the blending of law and equity permits all defenses, of whatever character, to be set up in an action at law." 23 Cyc. p. 1200, par. h. Such is the law of Louisiana, the courts of equity and the courts of law not being separate here.

"The effect of a former judgment as a bar or estoppel is

not affected by the fact that the action in which it was rendered included more parties than are joined in the suit in which it is pleaded, or that additional parties are joined in the second action; in either case a party or privy to the first action is bound by the judgment and a stranger is not." 23 Cyc. p. 1208, par. c.

"A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action and persons in privity with them, and cannot be again litigated in any future action between such parties or privies in the same court or any other court of concurrent jurisdiction, upon the same or a different cause of action." 23 Cyc. p. 1215, par. A, 1 a; Ib top of p. 1218.

"A person who comes into a pending action, by intervention or interpleader, setting up a claim to the subject of the controversy, is concluded by the judgment, and if it is in his favor he may take advantage of it in any subsequent litigation in which the same questions are raised, and the same parties are concerned." 23 Cyc. p. 1248 par. 4.

"A judgment is conclusive and binding, not only upon the parties in the action in which it was rendered, but also upon persons who are in privity with them in respect to the subject matter of the litigation." 23 Cyc. 1253 par. 5 a.

"Privity means a mutual or successive relationship to the same rights of property; and within the rules relating to the conclusiveness of judgments all persons are privies to a judgment whose succession to the rights of property thereby adjudicated or affected were derived through or under one or other of the parties to the action, and accrued subsequent to the commencement of that suit." 23 Cyc. p. 1253 par. b.

"If parties litigate a question in a court of competent jurisdiction, and a final decision is given thereon, such parties or those claiming through them cannot afterward reopen the same question in another court." Under Note 69 p. 1253, 23 Cyc.

"A judgment determining title to land, claimed by two persons, runs with the land, and binds all persons claiming through either party to the suit by title acquired after the rendition of the judgment. And as to property generally, both real and personal, a successor in interest is concluded by a judgment for or against him from whom he derived his title, whether it be by purchase, inheritance, devise, or otherwise." 23 Cyc. p. 1256 par. f.

"A judgment in an action respecting real property or titles or rights thereto, against a grantor of such property, is binding on his grantee, provided the latter acquired his interest after the institution of the suit, or after the judgment was rendered." 23 Cyc. p. 1257 par. (111) (A).

"A judgment in a suit to which the husband is a party is binding upon the wife where the suit is in regard to community property. 23 Cyc. p. 1262-3-4 par. j; and also binding upon their children where they claim under the parent. 23 Cyc. p. 1264 par. k.

"A judgment is an estoppel upon a party not only in so far as it decides a question adversely to his claim or contention in the suit in which it is rendered, but where it recognizes or sustains his theory or claim it estops him from afterward taking a different position in litigation with the same opponent. 23 Cyc. p. 1292 (VIII).

"The fact that in the former suit additional property rights or interest were involved does not affect the conclusiveness of the judgment as to that portion involved in the suit in which the estoppel is set up." 23 Cyc. p. 1291, par.

(V). "The estoppel of a judgment extends only to the particular property or right in controversy, except where it determines the title or right under which the party claims, in which case it is decisive as to any other property or right claimed under the same title." 23 Cyc. pp. 1291-2, par VI.

"But if a point or question was in issue and adjudicated in a former suit, a party bound by the judgment cannot escape the estoppel by producing at a second trial new arguments or additional or different evidence in support of the proposition which was decided adversely to him." 23 Cyc. p. 1291, (IV).

"A decision adjudging a conveyance, contract, or other instrument to be fraudulent or invalid is conclusive of that fact in all further litigation between the same parties; and on the other hand, a judgment giving effect to a deed, mortgage, judgment, or contract, is conclusive evidence that it is free from fraud or illegality, even though that issue was not raised in the action, since in that case the judgment necessarily implies a finding that the cause of action was valid and enforceable, except where the party objecting was ignorant of the fraud or illegality before the judgment, or was prevented from pleading it." 23 Cyc. p. 1294, par. e.

"The general rule is that a judgment is conclusive, for the purposes of a second action between the same parties or their privies, of all facts, questions, or claims which were distinctly in issue and adjudicated, whether the second suit be upon the same or a different cause of action." 23 Cyc. p. 1302, par. 4, a.

"A judgment authorizing a recovery on a written instrument necessarily involves an adjudication of its validity." 23 Cyc. 1308.

"Where the right, title or ownership of property is directly put in issue, whether by the pleadings or the course

of the litigation, and is tried and determined, the judgment is conclusive thereon in all further litigation between the same parties or their privies, whatever may have been the nature or purpose of the action in which the judgment was rendered or of that in which the estoppel is set up, * * * its estoppel constitutes a part of the title, and runs with the land, extending to all who are privies in estate to either of the parties. Moreover, a decision on a question of title to lands is conclusive in a subsequent suit between the same parties in respect to other lands, when the lands in both suits have a common source of title, and the title depends upon the existence or non-existence of a fact directly adjudicated in the former case." 23 Cyc. pp 1319-21, par. 10, a.

"Judgment affirming the validity of a sale and transfer of property is conclusive on the parties thereto with respect to all the property covered by the transaction in question, although but part thereof was in fact the subject-matter of the issues in the case in which the judgment was rendered." Peterson vs. Warner, 6 Kan. App. 298; 50 Pac. 1091, cited in Note 66 on p. 1321, 23 Cyc.

"When the validity of a contract is adjudicated in an action upon it, * * * the question is conclusively settled by the judgment for the purposes of all further litigation between the parties * * * " 23 Cyc. p. 1322, b.

In Sadler vs. Henderson, 112 La. 518, on pp. 523 and 524, the Court held that the vendee was privy in contract with his vendor, and entitled to the plea of *res judicata*, as a shield to his title, from a judgment sustaining the vendor's title.

In 152 U. S. 301, on p. 314, this Court commenting on a decision in Campbell vs. Hall, 16 N. Y. 575, said: "Speaking of the rule that a grantee is estopped by a judgment against his grantor, because he holds a derivative title from his

grantor, and cannot, therefore, be in a better position than the party from whom he obtained his right, the court observed: * * *. The principle in such cases is that the estoppel attaches itself to and runs with the land. The grantor can transfer no greater right than he himself has, and hence the title which he conveyed must necessarily be subject, in the hands of the grantee, to all the burdens which rested upon it at the time of the transfer."

The Louisiana law is the same. Article 23 of our Code of Practice provides that: "The universal successors * * * are entitled to the same actions and exceptions as the person to whom they succeed; but they cannot claim, on their own behalf, any right which he had not himself, for this reason, that no one can transfer a better title to another than that which he himself had." Article 24 provides: "The rule laid down in the preceding article takes place also with respect to the successor of a deceased person claiming a thing by virtue of a particular title; that is to say, by sale, donation or legacy, but so far only as concerns the thing itself, of which the deceased has thus disposed of in their favor."

From Justinian comes to us the maxim: "*Nemo plus juris ad alium transferre potest quam ipse habet.*"

Article 2236 of our Civil Code provides: "The authentic act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns, unless it be declared and proved a forgery." And Article 2242 provides: "An act under private signature, acknowledged by the party against whom it is adduced, or legally held to be acknowledged, has, between those who have subscribed it, and their heirs and assigns, the same credit as an authentic act."

Article 2442 of the Civil Code provides that: "Sales of immovables under private signature shall have effect against creditors and third persons generally only from registry of

sale and delivery of thing sold," but it further provides; "But this defect of registry shall not be pleaded between the parties who shall have contracted in such act, their heirs and assigns, who are as effectually bound by a sale made under private signature, as if it were an authentic act."

Article C. C, 3556, No. 5—"Assigns means those to whom rights have been transmitted by particular title; such as sale, donation, legacy, transfer or cession." Ib. No. 28:—"Successor is, generally speaking, a person who takes the place of another. There are in law two sorts of successors: the successor by universal title, such as the heir, the universal legatee, and the legatee by universal title and the successor by particular title, such as the buyer, donee or legatee of particular things, the transferee. The *universal* successor represents the person of the deceased, and succeeds to all his rights and charges. The *particular* successor succeeds only to the rights appertaining to the thing which is sold, ceded or bequeathed to him."

These several provisions of our Codes show that the parties, their heirs and assigns are equally bound under our law, and the buyer and successor by particular title, as well as the heir or successor by general title, is equally bound with the party to whose rights he may have succeeded. How could it be otherwise? How could any one acquire greater rights than the author of his title had? A man cannot transmit more than he has; so when he transmits any right it goes to the transferee with all the advantages it enjoyed and all the disadvantages it was encumbered in his hands

"A final judgment rendered by a court of competent jurisdiction, on the merits, is a bar to any future suit between the same parties, or their privies, upon the same cause of action. Successors to, or ayans-cause of, the parties to the original suit are in legal contemplation, the same as such

parties, provided they acquired their title after the institution of the original suit." 109 La. 533, Hargrove vs. Mouton.

On p. 536 the Court says: "Successors to, or ayans-cause of the parties in the original suit are considered in law as having been parties themselves where their titles have been acquired since the institution of the action in which the original judgment was rendered. Delabigarre v. Second Municipality, 3 La. Ann. 236."

"Matters once determined by a court of competent jurisdiction, if the judgment has become final can never be called in question by the parties or their privies, though the judgment may have been erroneous and liable to certain reversal on appeal. This estoppel extends to every material allegation which was at issue in the cause, and was therein determined." 34 A. 805; 109 La. 533; 30 A. 838; 47 A. 234; 49 A. 1332.

"It matters not under what form the question be presented, whether by petition, exception, answer, rule or intervention, whenever the same question recurs between the same parties, the plea of res adjudicata estops." 35 A. 553; 12 A. 197; 46 A. 1082.

"In a petitory action, the defendant is bound to plead all the titles under which he claims to be owner, and a final judgment rendered in favor of the plaintiff may be pleaded as res judicata against any title which the defendant was possessed of at the time, but omitted to plead." 14 A. 575. On page 576 the Court says: "When an issue is made between the parties to a suit, each is presumed to adduce all the evidence in his power to enable the issue to be determined correctly. If one of the parties neglects or does not wish to introduce a part of his evidence when it is known to him, the issue cannot, after a final decision, be again opened to enable him to do so."

"If this were possible, litigation would be uselessly continued. If a party has four titles, he could institute in succession four different suits, instead of having the issue of ownership terminated in one suit. C. C. 2265; (Now 2286.) Williams vs. Close, 12 Ann. 878." Dowell vs. Applegate, 162 U. S. 327, holds the same thing- that a second suit cannot be prosecuted on a different title held by the party when the first judgment was rendered. To the same effect, 106 La. 530; 109 La. 1030; 3 Wall. 1; 4 Wall. 657; 7 How. 198; 22 How. 352: 6 Wheat, 109.

B and E were tenants under a lease from W of an undivided interest in a mine. After the expiration of their lease they remained in possession recognizing the superior title to the whole mine of H, a co-owner, and denying the title of W. W brought suit against B, E and H, in which suit the title of W was recognized by judgment. Pending that suit a corporation, of which H was president, was formed and put in possession of the whole mine. In a second suit against B, E, H and the corporation, the judgment in the first suit was held to be conclusive of the rights of W as against all the defendants." 110 U. S. 296, Whiteside vs. Hazelton.

"A deed becomes operative from the time of delivery to the grantee, and its operation cannot be affected by proof of any agreement in conflict with the plain terms of the instrument."

"A grantor cannot by any act subsequent to the delivery of his deed invalidate, alter, or affect the instrument." (So, Dr. Lovett cannot now by his testimony invalidate the deed he gave W. J. Knight in 1882.)

"The title of the grantee becomes perfect upon delivery to, and acceptance by him of the deed." 13 Cyc. p. 572, 6, a. b and c.

"Secret unexpressed intention will not be permitted to

vary the deed or change its meaning where the language used leaves no room for doubt." Hoyt vs. Ketcham, 54 Conn. 605, Atl. 606, cited in 13, Cyc. p. 601, note 33.

"Although the object of construing a deed is to ascertain the intention of the parties and especially of the grantor, and although it is well settled that deeds must be construed so as to effectuate if possible the intentions of the parties or of the grantor, it cannot be so construed if inconsistent with settled rules of law or of some principle of law, or in violation thereof, or in violation of some rule of property. * * * *" 13 Cyc. p. 601 & 2, c.

However, the laws of construction contemplate that the intention of the parties is to be ascertained from the instrument itself, from a construction of the language used, and not from illegal oral evidence. 13 Cyc. p. 602 to 611.

"It is the general rule that all parties to a deed are bound by the recitals in it legitimately appertaining to the subject matter. It applies not only to the parties immediately, but to those claiming under them, to privies in blood, in estate, and in law." 13 Cyc. p. 611 and 12 (II.)

"Although denied in an answer by defendant who claimed through a party who executed the deed, a recital may be taken to be true." Note 28.

"Where a mortgage is sought to be annulled on the ground that the mortgagor was not the owner of the mortgaged property, the issue involves the title of the mortgagor, and parol evidence is inadmissible." Barrow vs. Grant. 116 La. 952.

The Court, after considering the limits within which parol evidence is admissible under allegations of fraud, generally in suits by creditors to uncover property of debtors, said further: "But parol is not admissible to show that in a sale of real estate the vendee named in the act was not the

real vendee but that another was. McKenzie vs. Bacon, 40 La. Ann. 157, 4 South 65; Perrault vs. Perrault, 32 La. Ann. 635; Hackenberg vs. Garscamp, 30 La. Ann. 898; Heirs of Dohan vs. Dohan, 42 La. Ann. 449; 7 South. 569; Tille vs, Taylor, 42 La. Ann, 1165, 8 South. 339; Stuerle vs. Kaiser, 44 La. Ann. 580, 12 South. 839; Wheelage vs. Lotz, 44 La. Ann. 600, 10 South. 923. It cannot be done even when the suit is by a creditor, seeking to uncover the property of his debtor. Hoffman vs. Ackerman 110 La. 1070, 35 South. 298."

As Dr. Lovett's evidence taken under commission was excluded, it may not be examined, although brought up with the bill of exceptions, and we do not want it examined, because we consider it totally inadmissible. But from the way plaintiffs' counsel referred to it, it would seem that they overrate it very much. In looking it over we are impressed with the conviction that the admission of such evidence to affect title to real estate would be very dangerous and render such titles very insecure.

The evidence fails entirely to prove the things sought to be established by it; the witness' memory is entirely too indistinct and uncertain on all subjects, besides being blank on the subjects embodied in many of the questions, to make it a safe guide, or even a fair index, in determining the rights of parties. He doesn't remember any of the details of the transaction, nor whether he testified in the suits against him and his partner in which the judgments were rendered, nor, if he did, what his testimony was. He doesn't remember what he testified on the first trial of this case, not even whether he testified to the effect that his testimony in the attachment suits in 1882 tended to support the validity of the sale of July, 1882, but conceded or surmised that, if he said anything about it at all, it was to that effect.

Now, whether this witness' memory is so bad as it ap-

pears to be, or whether he has changed since 1882, in either event, such testimony is surely a very unsafe test of title. We respectfully submit that our law requiring titles to real estate to be in writing, providing that they cannot be affected in any manner except by written evidence, and making parol evidence inadmissible to affect title to real estate, or to vary, alter or destroy written agreements, provides a much safer rule of property than would exist where such oral evidence might affect titles.

The loss which any one litigant might unjustly suffer for want of legal evidence is a very small matter compared to the importance of the stability and reliability of real estate titles. As before said, whatever trouble defendants have got into is due, not to any deffect in our law, but to the risks they voluntarily assumed or to their laches in not having the titles examined.

If defendants' title comes from W. J. Knight they cannot legally question his title; if their title comes from Knight & Lovett, being their privies or successors, they are bound by the same estoppels and restrictions as their authors would be; and surely, no one familiar with the law of Louisiana would pretend that Knight & Lovett could question the recitals of the act of sale in 1882 except by a counter letter, parol being utterly inadmissible.

We therefore pray that the writ of certiorari be recalled and dismissed at the cost of petitioners here; or that the judgment of the Court of Appeals be affirmed, if such be the practice.

Respectfully submitted,

M. J. CUNNINGHAM, JR.,

M. J. CUNNINGHAM,

Attorneys for Respondents.

[N. B.—Since this brief went to press the leading Counsel, M. J. Cunningham, Jr. died.]

Supreme Court of the United States

OCTOBER TERM, 1909

No. 101

LUTCHER & MOORE LUMBER CO. ET ALS., *Petitioners*

vs.

WM. H. KNIGHT ET ALS.

On Writ of Certiorari to the U. S. Circuit Court of Appeals for the Fifth Circuit

---

Supplemental Brief on Behalf of Respondents, Plaintiffs in the Suit.

M. J. CUNNINGHAM,
Attorney.

While waiting for the case to be called, counsel has had the opportunity to analyze Petitioners' Brief, and having written criticisms, we have concluded to have the work printed, and beg leave to file it herein as a supplemental brief.

Regarding this position that the court was without jurisdiction, it is sufficient to say that the Circuit Court assumed jurisdiction on defendants' petition for removal of the cause from the State court, indisputably a court of competent jurisdiction, both in law and equity. They did not ask for its transfer to the equity side of the Federal Court. They carried the case where they wanted it, over the zealous objection of plaintiffs, they went to trial without exception to jurisdiction; they were well satisfied with the first judgment, as it was in their favor, and when plaintiffs appealed they tried to maintain the judgment of the court, which they now say had no jurisdiction. When the Court of Appeals reversed the judgment and ordered the return of the case to the State court, which has all the equity powers they now invoke, they avoided the execution of the order to return by amending the petition for removal, and provoked the action of the Federal Court retaining jurisdiction, still failing to ask for the transfer of the case to the equity side of that court, and still failing to question the jurisdiction of the court. When the demurrer was sustained and their bill in equity dismissed they took no appeal, but acquiesced in the judgment and went to trial a second time of the case as brought by plaintiffs and again failed to accept the jurisdiction of the court and ask for its transfer to the equity side of the court.

In their brief defendants (plaintiffs here) say there is no proof that the validity of the title under the act of sale by Knight Lovett to W. J. Knight, July 28, 1882, was put at issue or that issue was determined by the judgments plead as *res judicata.*

The petition in one of the cases, Record, p. 39, avers that Knight and Lovett had "disposed of a large part of their property * * * with intent to defraud their creditors, including petitioners," and therefore they asked for an attachment, which was issued, and was levied upon movables

covered by this title of July, 1882, during the following month of August, 1882. In his petition of intervention in that suit, beginning at the bottom of R. 41, and filed in September, 1882, W. J. Knight averred that under the writ of attachment issued in that case the sheriff had seized "ten (10) yoke of oxen, three (3) log carts, one (1) log wagon, six (6) log chains and one (1) set of blacksmith tools * * * and that he is the legal, just and *bona fide* owner of said property * * * and now intervenes in said suit No. 60, claiming said property so attached to belong to him, as seen by act of sale and purchase from said defendants," &c. Plaintiffs and defendants were cited to answer the intervenion (R. 43). In their answer to the intervention (R. 45) plaintiffs specially averred "that said intervenors alleged title to said property is a pretended deed of sale to him from the defendants in said suit, and that said pretended deed and the pretended contract of sale evidenced by said deed, were and are a mere and fraudulent simulation and illegal, null and void." In the judgment in that case, beginning at bottom of R. 45, it was "ordered, adjudged and decreed that said intervenor, William J. Knight, do have judgment against said plaintiff McIlhenny Company, recognizing and decreeing said intervenor to be the rightful owner of the property attached in said suit, under and by virtue of intervenors purchase thereof from said defendants, by the act of sale executed July 28, 1882, in evidence in said suit, which act of sale is hereby decreed to be a real sale and not a simulation."

In the suit of Jemison *vs.* Knight & Lovett, a similar allegation for attachment was made, R. 47; in his petition of intervention in the Jemison suit, W. J. Knight averred that the sheriff, under the writ of attachment in that case, had "attached and taken in his possession a certain lot of goods, wares and merchandise generally" * * * and that he was the owner of the property so attached, as seen

by the sale from defendants duly recorded. After being duly cited plaintiffs filed an answer which contains the same averment that the sale to W. J. Knight was a fraudulent simulation, &c., R. 56; and the judgment likewise upheld W. J. Knight's title, and decreed it to be a real sale and not a simulation. The title so upheld and decreed to be a real sale and not a simulation is to be found in the Record on pp. 31 and 32, and covers the land here involved and the movables attached in those suits.

So, it is clear that, as between W. J. Knight, intervenor, and both plaintiffs, and defendants in said two suits, the validity of the act of July 28, 1882, as a title, was in issue, and the only issue, and was directly determined by the judgments in both cases, which judgments are a final determination of that question as against all the parties to said suits and their privies, successors and assigns. Defendants having acquired title by purchase from a party to the act of July, 1882, as well as a party to the suits in which the judgments were rendered, are privies by contract to said party, the author of his title, and concluded by the estoppels that affected his author, and which estoppels became attached to the land and followed it into the hands of the purchaser—the then owner and vendor being unable to give any better title than he himself had.

Under the pretext of a right and an attempt to rebut the presumption that property acquired during marriage belongs to the community, and ignoring the fact that where such proof has been admitted the question in every case cited was, not whether the sale was simulated or real, honest or fraudulent, whether the apparent vendee was the buyer or a person interposed, but only whether the property was paid for with the wife's separate funds, defendants have sought to ignore and violate the provisions of the Louisiana law that sales of real estate must be in writing, that the only means allowed to prove, as between the parties of their privies,

that a sale is simulated, or that the real contract was different from the act as written, is by a counter letter, or by interrogatories on facts and articles by one of the parties to the other, whose answers are final and cannot be contradicted, that parol is inadmissible to vary, contradict or alter the terms of a written contract, that a party or his assigns cannot prove by parol what was said before, at the time, or after signing an act, that the act as written is conclusive proof of the contract, that parol is inadmissible to prove that the apparent vendee was not the real buyer, but an agent of others, that a party cannot question the title of his author, that when the pleadings or evidence show that both parties derive title from the same person neither can dispute the title of their common author, that parties are estopped and bound by their acts and by judgments in suits to which they were parties, that such estoppels have equal force against privies, that the buyer is privy by contract to his vendor, that estoppels attach to the land and follow it into whosoever hands it goes, that a judgment adjudicating upon a title covers everything covered by the title whether involved or not in the former suit, that judgments must be given the same force by all courts.

To sustain our contention that all these things are true and that the evidence offered is inadmissible under some one or other of these heads, we have cited over a hundred authorities in our brief.

The case cited by defendants in 129 U. S., 387, Ruckman vs. Cory, that only a court of equity can compel the surrender of a legal title held by defendant, has no application under the law of Louisiana, where there are no such distinctions in the character of proof and relief permissible in actions at law and in equity. In Louisiana the only way a party can contradict the terms of an act are (1) by counter-letter, and (2) by the answers of the other party to interrogatories propounded to him. If Cory had wished to secure

Ruckman in the way he did with land in Louisiana, the only certain way he could possibly have done so, without putting himself completely in Ruckman's power, was to require and obtain from Ruckman a counter-letter acknowledging his title; and if he had failed to do that, his only remedy was to sue Ruckman before he transferred the land, propounded interrogatories and trust to Ruckman's answers.

But in that case Ruckman's transferree had allowed Cory to remain in possession as owner for many years and her action in ejectment was Cory's first notice of her claim of title; so, the court held that she and not Cory had been guilty of laches, quoting from a decision of the State court (Illinois) that: "The possession is notice to all of the possessor's equitable rights, and he need to assert them only when he may find occasion to do so."

But, even in that case, the court in referring to depositions of witnesses as to statements made by Ruckman (he having died before the institution of the suit) favorable to Cory and against the interest of the defendant, his grantee, the court said: "This evidence, it is contended, and properly so, was incompetent under the well established rule that 'a grantee in a deed is not affected with the declarations of the grantor made after the execution and delivery of the deed unless, with full knowledge of such declarations, he acquiesces in or sanctions them.'" So, here, we cannot be affected by the declarations or evidence of Dr. Lovett as one of our grantors.

Defendants' brief quotes from 90 Fed., 711, that: "Legal and equitable causes of action cannot be joined in one suit in the courts of the United States;" but if this suit is open to that criticism, of presenting both legal and equitable causes of action, a complete reply to defendants' objection is that we are not responsible for the case being in the Federal courts; the suit was instituted in a State court, with ample jurisdiction to try and determine all issues whether pre-

sented in legal or equitable causes of action, and where no such distinction exists. Defendants having procured its removal, having lodged it where they wanted it, never having suggested a transfer to the equity side of the Federal Court, nor excepted to the jurisdiction, they cannot be heard at this late day, after taking the chances of success in the court of their own choosing, to question the jurisdiction sought and accepted by them.

Besides, the power of removal does not include the power of destruction. The case cited in 90 Fed., 711, was instituted in the Federal Court and the precise rulings there may not be applicable to a case removed from a State court. We respectfully submit that when a Federal judge orders the removal of a suit from a State court, in which it was properly brought, he must try it as he finds it. Plaintiff in the suit cannot be compelled to bring his suit over again so as to conform to Federal practice, but, even if he can, no effort was made to have these plaintiffs do so, and defendants are not now in a position to question the jurisdiction of the court of their own choice.

The same language is to be found in Foster's Federal Practice, §360a, also cited by defendants; and that paragraph provides that: "In actions at common law in civil causes, the Circuit and District courts of the United States follow the forms and rules of pleading observed in the courts of the State where they are held, except in those particulars that are regulated by Federal statutes. The same rule applies as regards the joinder of parties, the joinder of causes of action, the joinder of defenses, the verification of pleadings, the time and manner of service, and the amendment of pleadings. The pleading of an equitable defense of an equitable set-off is not permitted at common law. But where the State practice so permits, the defendant may plead as a set-off a cause of action at common law against the plaintiff."

We are unable to find the clause purporting to be a quotation from Foster's Federal Practice, 4 ed., vol. 2, section 360 (a), sec. 375 (see bottom of p. 10 and top of p. 11 of defendants' brief) in §§360 (a) or 375; but we do not find a provision in §375 that is destructive to defendants' claimed right to adduce the proof rejected, whether it be offered in a suit at law or bill in equity. That provision is on p. 1299, and reads: "Where the decisions of the courts of a State have established a local rule of property, they will usually be followed by the Federal courts held within such State. The statute law of a State will always be followed by a Federal Court there held, so far as the statutes establish a local rule of property; and nearly always, so far as they create or abolish rights as distinct from remedies." And on p. 1304 we find this: "The title to land formed by accretion, the rights of riparian owners in the bed of a stream, whether navigable or otherwise, the validity of tax sales, the duty of the grantee of a coal mine to sustain the surface, the rights of abuttors in streets, the law as to what constitutes possession of land, and generally all questions affecting real estate, in the absence of constitutional difficulties, depend upon the local rule of property."

So, even the authority cited by defendants destroys their case. The rights of the parties to this suit, as in all cases regarding real estate, must be determined by the law of the State in which the land is situated, and there is no support for defendants' contentions in the law or jurisprudence of Louisiana.

Defendants' contention that the plea of *res judicata* is not before the court, because plaintiffs waived it by going to trial without a trial upon it, is without merit, and is not sustained by the authorities cited by him for that purpose. The case cited in 14 L., 430, has no reference to such exceptions as this, as it merely decides that "an exception to the form of action will be considered as waived, by filing an

answer to the merits." As to such exceptions (those relating to form) the Louisiana Code of Practice, Art. 344, provides that: "Such exceptions must be pleaded *in limine litis* * * * After the defendant has pleaded to the merits, such exceptions shall not be heard; all nullities are cured." So, evidently, the court could not hold otherwise with an exception to mere form. The case cited in 16 La. 414, has no tendency to sustain defendants' contention here, as it merely held that where defendant set up a plea in reconvention for reimbursement for improvements on land, he could not be heard to plead *res judicata* against plaintiffs' demand for rents and revenues, on the ground that they had not been allowed in the judgment decreeing plaintiff to be the owner of the land; but that case furnishes strong authority against defendants' contention here, because the plea of *res judicata* considered and decided in that case was only filed on appeal.

But the law regarding peremptory exceptions formed on law, is very different from that governing exceptions to form. Article of Louisiana Code of Practice 346 provides that peremptory exceptions founded on law may be pleaded in every stage of the action previous to final judgment. Article 345 describes peremptory exceptions founded on law as those which, without going into the merits of the cause, show that the plaintiff cannot maintain his action, either because it is prescribed or because the cause of action has been destroyed or extinguished. It needs no special provision or argument to show that a plea of *res judicata*, if good, destroys and extinguishes plaintiffs' right of action. Definitive or final judgments are such as decide all the points in controversy between the parties; they are such as have the force of *res judicata*. The points of contention, the issues involved, the things adjudged, as between W. J. Knight, intervenor, and the plaintiffs and defendants in the two cases set up as *res judicata*, were (1) that the property

attached in those suits was acquired by intervenor under the act of sale of July 28, 1882, and (2) that that sale was not a simulation, but a real, valid sale, and conveyed a perfect title to the property covered by it. It therefore follows that those judgments necessarily destroy the defense in this case, it being based solely on the invalidity of the act of July 28, 1882, which was held to be valid by those judgments.

Defendants quote Article of the Louisiana Civil Code 2286, misnumbering it 2268, possibly to contend that it is more restrictive than similar provisions in other jurisdictions; but an examination of the jurisprudence of Louisiana, as well as the decisions of this court in Louisiana cases cited in our brief, will show that it is construed so that, if different in any way from other similar provisions, it is given by the courts just as broad an operation as in other jurisdictions. We do not fully understand defendants' object, but presume it is to bolster up a contention which they sometimes appear to make, and sometimes not, that they are not bound by the estoppels which might have affected the authors of their title; but the authorities cited in our brief already filed effectually overcome any such contention. Indeed, in the notes under the article cited (2286) in Merrick's Code, several decisions are cited to show that the effect of judgments as *res judicata* extends to successors, assigns, and all who claim through them.

> 8, A. 126, Johnson *vs.* Weld; 47, A. 235, Fleitas *vs.* Mereaux—and others.

The case cited in 177 U. S., 390, does not sustain any contention of defendants; on the contrary, it holds that a judgment is *res judicata* of every defense which might have been set up, even though not actually presented. Our brief contains many authorities to the same effect.

The case in 5 Louisiana, A. 103, may have been cited because it says a judgment is not *res judicata* of issues made in the pleadings but not decided. Whether correct or not, it has no application, because the judgments claimed to be *res judicata* here decided all the issues presented in the pleadings. A similar criticism is just of the citation to 48, A. 1170.

As said in our brief on file, the various changes and shifting of positions of defendants in this case are very interesting, but have no legal support. These changes are manifest from the first answer filed to the last brief filed. When the learned counsel presently in charge of defendants' interests filed his supplemental brief in support of the application for certiorari, while disclaiming any right to prove title by parol, sought to have recognized his asserted right to prove by parol the creation of a trust, which would establish title by parol. In brief filed last, on January 18, still disclaiming the right to establish title by parol, they beg for the right to overcome by parol the presumption of community ownership, which would prove title by parol; and they cite cases in which they erroneously assert that the Supreme Court of the State allowed proof of title by parol, and then ask if others can, why not they?—thus showing their repeated disclaimers to be meaningless, and their only real object to be to prove title by parol.

In describing what falls into and belongs to the community the Civil Code mentions the estates which husband or wife may *acquire* during marriage; and on this slight foundation ingenious counsel assume that the Code covers only what the community acquires, not what each spouse may acquire; then contends that property put in the name of the husband without intention to sell it to him is not "acquire," so does not belong to the community; and then innocently undertakes to prove by parol that the recitals in the act of sale are not true, that the act does not contain the

true contract, that no sale was made, that the object and intent of the owners was not to sell the property, that the object was to constitute the apparent vendee the agent of the apparent vendors to manage and to sell the property for them, the real owners. In this effort, defendants blandly ignore all the provisions of the Louisiana Civil Code and hundreds of decisions of the Supreme Court, interpreting the codal provisions, as well as the fact that they, being the successors, assigns, privies of the parties to the act of sale, and to several suits where it was decreed that property acquired under that title belonged to the vendee and that said act was a real, valid sale, and not a simulation, and that they, as well as the original parties are estopped from questioning the recitals of the act or again raising questions settled by the judgment—all in violation, not only of the Louisiana law, of positive and unquestioned law in every jurisdiction we know of.

One glaring and fatal defect in defendants' pretentions in this regard is that they appeal to authority that does not bear them out or sustain them, because they seek to use decisions for a purpose entirely beyond their scope or purpose. Where the Supreme Court has sanctioned the use of parol to show whether or not property was paid for with paraphernal funds of the wife, in order to determine whether it is community property, or the separate property of the wife, defendants affect to think that was admitting parol to establish title, and sanctions their request here. Far from it.

In the case cited in 30 La., An. 167, the wife had bought property with her separate paraphernal funds, and was allowed to prove the facts, how she made the money, where it had been, and how her husband had never had the administration of it, in order to overcome the legal presumption of community ownership, not to disprove but to sustain the recitals of the act, not to establish title by parol,

because she had already a written title, not to establish facts she was estopped from asserting but to strengthen previous recitals.

In their brief, defendants say they set up in their answer that the act of July, 1882, was a fraudulent device to screen the property of Knight and Lovett. As a matter of fact, the word fraudulent was not used, and fraud is nowhere charged in the pleadings. But the law does not constitute defendants the champions or guardians of the creditors; and that very question was finally settled, contrary to defendants' contentions, in several suits of various creditors instituted for the express purpose of maintaining defendants' present contention—a vain contention about the thing adjudged—settled nearly thirty years ago, defendants' authors being parties to the suits, as well as the act.

The case cited in 29, A. 511, does not sustain defendants; but, on the contrary, it holds that parol is not admissible to prove fraud in the transfer of real estate except in a suit by creditors or forced heirs and on an allegation of fraud; and that, as between the parties and their legal representatives, parol evidence is inadmissible to show simulation, and that only a counter letter can avail such persons—just as we contend here. In that case the suit was brought by an administrator who represented the creditors; but he had not made the necessary allegation of fraud.

We cannot see that the case cited in 34, A. 1243, sustains defendants. That was a question of nullity of a tax title and the oral evidence, if any, must have been to show fraudulent conspiracy between the tax collector and the purchaser. But the tax title was annulled on the grounds that: "There is no evidence that the property was seized or advertised according to law. The sale was never recorded, and until it was recorded under the law, the Auditor could not affirm title. It is too clear to be disputed that all the statutory requirements in tax deed or sheriff's deed must be complied

with." So the judgment was not based on oral evidence, whatever it was; and the judge specially said he did not consider it necessary to enter into a review of it.

In 4, Rob. 290, parol was admitted to protect children of the first marriage from the supposed fraud of their step-father and tutor, on the theory that a counter letter their father should and might have probably fell into the hands of and was suppressed by the step-father and tutor.

Defendants' brief assumes that the act of July, 1882, was a simulation as a sale, and was the creation of a secret trust in fraud of the law; and says if Knight and Lovett had died before W. J. Knight executed his trust their heirs could have brought a bill alleging the secret trust and the reason whereof, and W. J. Knight would have been compelled to answer, notwithstanding the statute of frauds. That is so, but they could have compelled an answer in the only manner provided by law, by propounding interrogatories to him, and his answers would have been final, and plaintiffs would have had no legal right to introduce any other evidence. Defendants are in no better position and have no greater latitude regarding evidence than Knight and Lovett's children, or than Knight and Lovett themselves; and none of them have a right to such evidence as defendants seek to get in.

The citations in defendants' brief from Perry on Trusts and Bump on Fraudulent Conveyances have no application, because they evidently refer to suits by creditors under proper allegations to protect themselves from fraud—such suits as can only be prosecuted by persons, forced heirs or creditors, interested in the estate of the apparent vendor. Defendants are not in a position to demand such rights. They have no better title than their author had, and are bound by all the estoppels that affected their authors. Besides, if those authorities went as far as defendants claim, what they say would have no weight in this case, because violative of the law of Louisiana, which governs.

Defendants' claim that, even admitting that parol is inadmissible to prove that the apparent sale to W. J. Knight was a simulation, they still have the right to show that the property, although acquired during marriage, did not belong to the community, it devolving upon plaintiff to prove that it did belong to the community.

The trouble with defendants is that they always seek the same thing—their little variation in names works no change in substance. The only proof necessary for plaintiffs to introduce is the act of sale to their father during the life of their mother, and that creates the presumption that it was community property. The act makes full proof of its contents, full proof of the fact and date of the sale; and the law makes it community property. In every case, the person holding the contrary view carries the burden of proof, and they cannot discharge it by illegal evidence, by making oral proof where written is required.

Of course, defendants' assertions of right to prove that the act of July, 1882, was not a sale, but a simulation; that it was not a sale, but a gift; that it was not a sale, but the creation of a trust or agency; that while none of these things may be provable by parol, they still have the right to prove that the property did not belong to the community—all mean the same thing. Whatever they may call it, it is merely and always a bold attempt to establish title to real estate by parol. The only possible way of proving that the property did not belong to the community is to prove that the act of July, 1882, was not a sale, and conveyed no title. If any title was conveyed at all, it was to the community. That is too plain to argue; and defendants cannot overcome the actual facts without trampling under foot eight or ten provisions of law which constitute the only protection to real estate titles in Louisiana.

The case cited in 50 La., An. 1228, has no bearing, because it was proved in that case that the wife paid for the

property with her parphernal funds, that she had ample means, and the community nothing. No such condition exists here. The statement in that case, also in 48 La., An. 785, and numerous others, that the presumption of community ownership can be overcome by proof furnishes no support to defendants' contention here, because they did not involve proof of title by parol. Defendants ask: "If it can be proved that the property purchased during marriage does not belong to the community but is the property of one of the spouses, why can it not be shown that it is not the property of either?" If they admit that the property here involved "was purchased during marriage," as above question concedes, they abandon all shadow of a case, even if it was ever as much as a shadow.

Of course, the question decided in 48 A. 783, 785 and 35 La., A. 571, that proof *aliunde* must be made that property purchased by a married person was paid for with the separate funds of the purported purchaser, is well settled, and it gives no excuse for defendants' action here.

We cannot see that the case cited in 2 How., 648, 650, affects this case. There it was charged that executors had fraudulently had a will probated when they knew it had been superseded; that under the superseded will the property had been brought by parties after notice of the illegal and fraudulent probate of a revoked will; that the legal heirs of decedent had brought this complicated suit seeking to be recognized as heirs at law and to have the proceedings under the revoked will set aside—being a sequel to another case twice before the court, reported in 13 Peters, 404, and 15 Peters, 9. Of course, if the facts were as alleged, plaintiffs were entitled to a remedy in some court, and to recover the property from the purchasers, who illegally held it, whether their acts created a trust or not; but the facts there are totally unlike those here, there is no sanction there for proof of title by parol, and that case gives defendants no support.

The citation from Story Equity Jurisprudence, Sec. 1531, Vol. 2, p. 1857, 13th Ed., furnishes no support for defendants' pretensions; on the contrary, it shows they have no such right. When Story speaks of the admissibility of parol to rebut a presumption, he does not mean that it is so admissible when it is apparent that, under the protext of an effort to rebut a presumption arising from an act, they are seeking to destroy the act itself, and to do things which involve the violation of numerous provisions of law, and disregard estoppels by which they are bound. In the quotation from Story, on p. 23 of defendants' brief, that distinguished author says "the same rule prevails in equity as at law, that parol evidence is not admissible to contradict, extend or vary written instruments; and that the interpretation of them must depend upon their own terms." As the whole statement must be taken together, from the foregoing it necessarily follows that when he says: "But in case of accident, mistake or fraud" parol is frequently admitted, &c., he does not mean that parol can entirely set aside the written instrument—contradict, disprove and defeat it entirely, as defendants apparently seek to do here.

Likewise, when he says parol will be allowed to rebut a presumption, &c., he does not mean that a party, on the pretense of rebutting a presumption, can destroy the instrument entirely and prove by parol things requiring written evidence, because he immediately says: "But in these latter cases they do not interfere with or repel the proper construction of the instrument itself, but only the artificial rules of presumption or of equity which they themselves have created or applied to cases perfectly indeterminate in their nature, and admitting of either construction according to the real intent of the party." Under their own authority as quoted in their brief, it is clear that defendants had no right to introduce the evidence offered and rejected.

The case cited in 35 A. 572 is merely another case where

the court reiterated that proof outside the recital in the act must be produced to show that the separate funds of the wife were used to pay for property bought in her name, to overcome the presumption of ownership by the community. These cases have no hearing, except to strengthen our claim of ownership. No one questions the right of defendants to rebut the presumption of community ownership by proof, such as was admitted in all those cases, whether written or oral, that the husband bought the property with his separate funds, and all about how he got the money and how it was separate funds. But these cases furnish no authority for defendants' efforts to contradict the recitals of the written act of July 28, 1882, as they are evidently attempting to do.

Of course, property bought during marriage for $15,000.00, on terms of $500.00 cash and $14,500.00 on a credit, could hardly have been bought for the separate account of the husband. In fact, it is perfectly evident that it was community property, and it is plain that when defendants pretend to seek to overcome the presumption of community ownership their real object is to defeat and contradict the entire act.

The case cited in 118 La., 462 could hardly be authority here where there are no similar facts. That was a case where a man bought a piece of property and took the title in his name as natural tutor of his daughter, although he was not her tutor, her mother being still alive, and the court never having confirmed him.

Besides, if he had been tutor, he could not have bought the property, as such, for Art. 363 of the Louisiana Civil Code says: "The tutor cannot borrow for the minor, purchase for him unmovables or compromise respecting his rights, without authority from the judge granted on the advice of a family meeting." Afterwards, he sold the property as natural tutor of his daughter, which the above quoted article also forbids. As the court said, somebody

bought the property; the vendor had been paid for it and transferred his title; the father paid the money, and as he was not tutor and had not been authorized to invest any money for his ward, the acquisition must have been for his own account, and his purchase and sale were not vitiated by unnecessarily and illegally adding the quality of tutor to his name, as vendee first and then as vendor, and therefore he conveyed a good title in law to his vendee. This would seem the inevitable conclusion on the law and in the absence of any record of proceedings confirming him as tutor and authorizing him first to buy and then to sell the property for his ward. Therefore oral evidence as to his declaration and insolvency were of no importance, and whether admitted or excluded, could not affect the result. But it will be observed that, whether that oral evidence were important and admissible or not, its object was not to prove title by parol, but to show the quality in which the father acted, not to destroy the act or defeat the title conveyed by it, but to clear the title by showing that the father really acted in his individual capacity and interest, which he had a legal right to do, and not as tutor, as erroneously stated, which would have been fatally illegal, both in the purchase and sale; and this brings us back to the starting point that as the records did not show that the father was tutor and had been authorized to buy for his daughter in the manner prescribed by law, the daughter, the plaintiff in that suit, never had any title, could not possibly have recovered, and consequently the parol evidence was of no importance.

Counsel's contention on p. 27 of their brief that on the trial they had a right to show that when the intermediate transfers were made no price was paid to W. J. Knight, can not avail them, first because the record does not show any complaint by bill of exceptions or otherwise at the rejection of such evidence or that it was offered, and second, if it does, it would not influence the case, it not affecting the legality

of those intermediate transfers and whose legality is not in question, except in so far as it might tend to show the simulation of the act of July, 1882, which could not be done by the parties thereto and their privies except by a counter letter, and which cannot be done in any manner, even by counter letter, since the rendition of the judgments set up as *res judicata*. Defendants are only the successors by particular title, the assigns, the privies by contract of the parties to the act and suits of 1882 and equally bound with them, and are effectually estopped from questioning the legality of that sale. This estoppel is complete, and needs no re-enforcement by reason of the act itself, the parties and their privies not being allowed to contradict, vary or destroy their act. But that perfect estoppel was re-enforced by judgments in several suits to which all the parties to the act of sale were parties, the vendors as defendants and the vendee as intervenor, in which suits the ownership of property under that act and the validity and reality of that act were the only issues, and which judgments passed upon those issues, sustained the ownership claimed under that title, and held that act to be real and valid, and not simulated.

There is nothing in the claim of defendants that the plea of *res judicata* was waived and is not before the court, because we went to trial of the case without a previous trial of the exception. The case cited in 4 La. was on an exception to form, which, if sustained, would only cause delay, and which the Code of Practice provides must be filed before answer; but *res judicata* is a peremptory exception founded on law, which, if sustained, effectually and finally destroys a cause of action and causes the rejection of the demand, and which the Code of Practice provides can be filed at any stage of the proceedings before final judgment. In 16 La., the other case cited by defendants, the plea was filed on appeal. Indeed, we doubt if it was necessary in this case to file a specific plea. It was set up against an issue raised

in the answer and no counter plea by plaintiff is necessary in Louisiana. It could have been urged, and proof introduced to sustain it, in objecting to evidence offered. In fact, in a case of this kind its only object was to exclude evidence, and whenever the plea was filed, whether before trial, or when the evidence was offered during the trial, there was no occasion to try the exception or to file the evidence to sustain it until the evidence was offered at which it was aimed. At any rate the plea was urged, the evidence to sustain it filed, the evidence at which it was aimed rejected, and therefore the plea was sustained, in whatever shape it came up.

Considering that no man can give a better title than he has, it seems elementary that the title in any sale passes to the vendee, not only clothed with all the rights and advantages enjoyed by the vendor, but necessarily encumbered with all the defects and estoppels that affected the vendor, and therefore defendants have no greater rights than their author, whoever he may be, and are estopped from doing anything and from proving anything his author could not do or prove under the law. The authorities cited in our brief on file fully sustain this position; and it seems to us impossible to grant relief to defendants without reversing jurisprudence and upsetting principles universally recognized. This is only one of the phases of the defense. They not only appear to think they are not affected by the estoppels which affected their author, and whoever he was, whether W. J. Knight or Knight & Lovett, or all of them, it is the same thing, as all were parties to the acts and to the suits, they disregard the prohibition that forbids any man from questioning his author's title, the requirement of written title, the prohibition against parol to affect titles and written instruments, proof of agency by parol, proof that apparent vendee was really agent of others, &c., &c. It seems to us the defense is devoid of legal merit.

The Record, pp. 95 to 102, shows that plaintiffs here filed a bill in equity, No. 286, in the Circuit Court, setting up the same matters urged here; that the respondents here filed a demurrer to that bill; that judgment was rendered sustaining the demurrer and dismissing the bill. That judgment was rendered February 16, 1904, no appeal was taken, it is now final, and we plead it as *res judicata* against the relief sought by plaintiffs here. It makes no difference whether that judgment was correct or not, plaintiffs' failure to appeal from it was an acquiescence in it, and it binds and estops them from now urging the same matters set up in that bill. The authorities cited in our original brief fully sustains this contention.

The facts as to this bill, the demurrer, the judgment and no appeal are also stated in the brief filed for plaintiffs here, pp. 6 to 8; and on p. 13 of their brief they admit that the judgment sustaining the demurrer and dismissing the bill was "acquiesced in by the defendants there (petitioners here) and became *res judicata* as to them. The effect of this ruling was to place the case on the law side of the court to be there disposed of according to the rules of practice governing the trial of such cases in the State of Louisiana (U. S. R. Stats., Sec. 914)." This seems to finally dispose of petitioners' demands here, and cause a recall of the writ of certiorari and a dismissal of the case.

Respectfully submitted.

M. J. CUNNINGHAM,
Attorney of Respondents.